IN THE

Supreme Court of the United States

October Term, 1972

No.

WINDWARD SHIPPING (LONDON) LIMITED, *et al.*,
Petitioners,

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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Petitioners WINDWARD SHIPPING (LONDON) LIMITED, SPS BULKCARRIERS CORP., and WESTWIND AFRICA LINE, LTD. pray that a writ of certiorari issue to review the judgment of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, entered on May 17, 1972.[1]

[1] Respondents are

American Radio Association, AFL-CIO;

International Organization of Master Mates and Pilots, AFL-CIO;

National Marine Engineers Beneficial Association, AFL-CIO;

National Maritime Union of America, AFL-CIO;

Radio Officers Union of the United Telegraph Workers, AFL-CIO; and

Seafarers International Union of North America, AFL-CIO.

Opinions Below

The order of the Supreme Court of Texas, dated October 4, 1972, refusing petitioners' application for a writ of error, which was entered without opinion, is set forth at pages D1-2 of the Appendix.

The opinion of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, dated May 17, 1972, is reported at 482 S. W. 2d 675 and is set forth at pages B1-13 of the Appendix.

The unreported opinion of the District Court of Harris County, 164th Judicial District of Texas, dated December 10, 1971, is set forth at pages A1-3 of the Appendix.

Jurisdiction

The judgment of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas issued and was entered on May 17, 1972 (Appendix pages B1-13). A motion for a rehearing was denied by order dated June 14, 1972 (Appendix pages C1-2). Petitioners' application to the Supreme Court of Texas for a writ of error was refused by order dated October 4, 1972 (Appendix pages D1-2). Petitioners' application for an extension of time in which to file the present petition for writ of certiorari was granted by Mr. Justice Powell by order dated December 8, 1972, which order extended the time for filing of this petition to and including February 1, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

Question Presented

Whether the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, erred in applying in the present case the rule stated in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959), that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act (The Labor Management Relations Act, as amended) the States as well as the federal courts, must defer to the exclusive competence of the National Labor Relations Board . . ." (*id.* at 245) and in determining under that rule that the Labor Management Relations Act, as amended, 29 U. S. C. § 141, *et seq.* ("the Labor Act") arguably applies to a dispute between American unions and foreign owned, foreign flag ships manned by foreign crews represented by foreign unions so as to preempt the jurisdiction of a state court over an action seeking injunctive relief against picketing by the American unions, a stated purpose of which was to protest allegedly substandard wages and working conditions on board such ships and an intended and actual effect of which was to cause longshoremen and others to refuse to cross the picket lines and to refuse to perform services for the ships.

Statutes Involved

Petitioners contend that the jurisdictional scope of the Labor Management Relations Act, as amended, 61 Stat. 136 (1947), 29 U. S. C. §§ 141-187, does not extend to the foreign ships here involved or to the conduct of parties to disputes which relate to the internal affairs of such foreign ships. The answer to this question cannot be obtained by reference to any particular section of the Act which literally construed would extend to govern the relations between labor and management in all countries. By way of illustration sections 141, 151, 157 and 158 are reprinted in Appendix F.

Statement of the Case

The Parties

Petitioner Windward Shipping (London) Limited is a British corporation and is managing agent of the SS THEOMANA (O.R. 1, page 109).[2] Petitioner SPS Bulk-

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[2] All citations are to the original record transmitted by the Court of Civil Appeals, 14th Supreme Judicial District of Texas, to the Supreme Court of the United States pursuant to Rule 21 of the Supreme Court Rules. The fourteen parts of the original record are:

1. Transcript
2. Statement of facts, Vol. 1
2A. Statement of facts, Vol. 2
2B. Statement of facts, Vol. 3
2C. Statement of facts, Vol. 4
3. Certified copy of appellants' brief
4. Certified copy of stipulation
5. Certified copy of appellees' brief
6. Certified copy of amicus curiae brief
7. Certified copy of 14th Court of Civil Appeals' opinion
8. Certified copy of judgment recorded in Vol. 1, page 373, Minutes, 14th Court of Civil Appeals
9. Certified copy of appellants' motion for rehearing
10. Certified copy of supplemental brief in support of appellants' motion for hearing
11. Certified copy of order of 14th Court of Civil Appeals overruling appellants' motion for rehearing
12. Certified copy of application for writ of error
13. Certified copy of respondents' reply to petitioners' application for writ of error
14. Certified copy of order of Supreme Court of State of Texas refusing application for writ of error.

Citations are to the part of the record and to the page number within that part. Thus, a citation to page 10 of part 1 ("Transcript") is "O.R. 1, page 10" and a citation to page 20 of part 2 ("Statement of facts, Vol. 1") is "O.R. 2, page 20."

carriers Corp. is a Liberian corporation and owner of the SS THEOMANA (O.R. 1, pages 108-109). Petitioner Westwind Africa Line, Ltd. is a Liberian corporation and owner of the SS NORTHWIND (O.R. 1, page 108). Respondents are American unions representing licensed and unlicensed American seamen (O.R. 1, pages 7, 13).

The Vessels and Their Crews

The vessels SS THEOMANA and SS NORTHWIND are registered under the laws of Liberia and fly the Liberian flag (O.R. 1, page 108). The SS THEOMANA is a bulk carrier carrying bulk cargo and general cargo. The SS NORTHWIND is a dry cargo vessel (O.R. 1, page 109). The vessels are engaged in carrying cargo in international trade and do not carry cargo between United States ports (O.R. 1, page 108). Officers and crews of the vessels are made up entirely of foreign nationals, who are represented by foreign unions (O.R. 1, pages 111, 115). The wages and other terms and conditions of employment of the crew members are covered by a collective bargaining agreement with the Pan Hellenic Seamen's Federation except that certain members of the crews are covered by the Indonesia Seafarers' contract or the Sierra Leona Seamen's Union contract (O.R. 1, page 111; O.R. 2, page 17). None of the officers or crew members on the vessels is represented by any of the respondents (O.R. 2, page 16).

The Picketing and Its Consequences

On October 23, 1971, the SS THEOMANA docked in the Port of Houston, Texas to load a cargo for Bandar Shahpur, Iran. Loading of the vessel began the following day and continued until the evening of October 28 when members of respondent unions began picketing at the gangway of the SS THEOMANA after which the longshoremen refused to cross the picket line and the loading could not be completed (O.R. 2, pages 47-50; O.R. 2A,

page 70). The SS NORTHWIND docked at Houston on the morning of October 29 to off-load a part cargo of coffee and to load a cargo of wheat for Nigeria. Loading began within a few hours of the SS NORTHWIND's arrival and continued until afternoon, when members of respondent unions arrived at the gangway and began to picket. Longshoremen thereafter refused to cross the picket line and the ship was prevented from continuing to load the wheat or to off-load the coffee (O.R. 2, pages 26-31). The ship was at that stage in an unseaworthy condition by reason of being only partly loaded and could not sail (O.R. 2, pages 31-32).

At a hearing on November 9, 1971, various stipulations were made to the effect that the unions would permit certain limited work to be done for the ships so that they could be made seaworthy and able to sail, that the ships intended to call at United States ports in the future and that if they did they would be picketed again by the respondents (O.R. 2A, pages 57-60).

The Purpose of the Picketing and the Nature of Respondents' Dispute With the Ships of the Petitioners

The picketing was carried on jointly by members of the respondent unions. It was intended to and did have the effect of causing longshoremen and others engaged in unloading and loading the vessels to refuse to cross the picket lines and thus to prevent the completion of the unloading and loading of the vessels (O.R. 2, page 22; O.R. 2B, page 153; O.R. 1, pages 109-110).

The pickets carried picket signs which read "Attention to the public—The wages and benefits paid seamen aboard the vessel THEOMANA (NORTHWIND) are substandard to those of American seamen. . . . We have no dispute with any other vessel on this site". (The full legend on the signs is set out at O.R. 1, pages 109-110).

The pickets also carried leaflets which read in part: "To the Public—American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen. . . . Our dispute here is limited to the vessel picketed at this site, the SS ————." (The full contents of the leaflet are set out at O.R. 1, page 112).

The pickets were instructed in advance by the respondent unions and the attorneys representing them not to reply to any questions concerning the purpose of the picketing but merely to carry the signs and pass out the leaflets. These instructions were followed and the picketing was peaceful (O.R. 2B, pages 181, 187, 197, 198-200, 208, 209).

A union spokesman testified at the trial that the union's object was to get the foreign flag owners to increase the wages and improve the working conditions of the crews on the foreign flag ships so that American operators employing more highly paid American seamen would be more competitive with the foreign ships (O.R. 2B, pages 190-191). Another union spokesman testified that he agreed with the statement that if the foreign flag operators would realize that they should pay their crews the same wages and benefits which American seamen receive and cause their ships to have American seamen's standard working conditions, then the respondent unions would have accomplished their goal and would cease their activities (O.R. 2B, pages 158-159).

Notwithstanding the purposes and goals of the picketing, there is no evidence in the record or allegation by the respondent unions that the crews on board the vessels were not being paid in accordance with the contractual wages and benefits due to them under the various wage agreements signed with the foreign unions representing them. Moreover, there is no evidence that any of the union represen-

tatives contacted the petitioners with a request that any of the unions be recognized as the collective bargaining representatives of the crews on the ships (O.R. 2A, page 65).

There was considerable testimony introduced into the record by the respondents to the effect that foreign ships enjoy a cost advantage over American ships because the wage levels on foreign ships are lower than those on American ships, that this tends to make American ships uncompetitive with foreign ships and that over the years there has been a substantial decline in the number of American ships at sea and correspondingly in the number of jobs available to American seamen (O.R. 2B, pages 117-125, 189; O.R. 2C, pages 226, 227). There was also considerable testimony and evidence offered by the unions to the effect that the picketing was "publicity" picketing intended to protect the jobs of American seamen by calling to the attention of the public the loss of American jobs to foreign ships employing foreign seamen at wages which are "substandard" when compared to American wages, to request public support and cooperation and to ask the public to patronize American ships (O.R. 2B, pages 142-143, 150, 152, 160, 161; O.R. 1, pages 109-110).

Nevertheless the fact remains that the union action took the form of picketing the ships and handing out leaflets at shipside with the intention and expectation of causing longshoremen and others who were to perform services for the ships not to cross the picket lines and not to perform such services. In this respect the picketing was completely successful because the longshoremen did not cross the picket lines and the loading and unloading of the ships could not be accomplished (O.R. 2, pages 26-30, 47-50; O.R. 2B, pages 153, 163). Moreover, the only evidence in the record as to what petitioners could have done to cause the pickets to be withdrawn is that peti-

tioners would have had to increase wages and benefits paid to the foreign crews on their ships to the same level of wages and benefits received by American seamen and give them the same working conditions as American seamen (O.R. 2B, page 158).

The Litigation and the Manner in Which the Federal Question Was Raised

On October 30, 1971, petitioners Windward Shipping (London) Limited and SPS Bulkcarriers Corp. filed an action in the District Court of Harris County, Texas, 164th Judicial District, seeking temporary and permanent injunctive relief against respondents' picketing. That same day petitioner Westwind Africa Line, Ltd. filed a similar action in the same court. On November 8, 1971, petitioners filed amended complaints in their respective actions, alleging *inter alia* that the jurisdiction of the Texas courts was not pre-empted, and that the picketing by respondents was in violation of Article 5154d, Section 4, Texas Revised Civil Statutes, that such picketing was an intentional tort, that petitioners had no adequate remedy at law and that petitioners were suffering and would suffer irreparable injury. Respondents filed an answer alleging, *inter alia*, in paragraph VII that the matters alleged by the petitioners in their petitions were within the jurisdiction of the National Labor Relations Board ("the NLRB") so that the Texas court was without jurisdiction over the cause (Appendix E).

The cases, consolidated by agreement of the parties, came on for hearing on November 8, 1971. On that day and the following day, the hearing proceeded on the application for a temporary injunction. By agreement of the parties, the hearing was recessed until November 29, 1971, at which time the causes were tried on their merits as applications for permanent injunctive relief. This trial on the merits was agreed to by the parties as part of a

stipulation wherein it was also agreed that the unions would limit their picketing of the THEOMANA and NORTHWIND so as to make possible the doing of work necessary to permit the vessels to sail, without loading their full intended cargoes, that the vessels intended to return to the Port of Houston or some other United States port in the future, and that the unions would again picket the vessels if and when they returned to the United States (O.R. 2A, pages 57-60). On December 10, 1971, the District Court entered a judgment of dismissal on the ground that the issues were arguably subject to the exclusive jurisdiction of the NLRB and that the Texas court's jurisdiction was pre-empted (Appendix, pages A1-3). The District Court did not discuss any other issues in its opinion. Petitioners appealed to the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas. The Republic of Liberia filed a motion for leave to appear as *amicus curiae* which was granted by the Court of Civil Appeals on April 5, 1972, and the brief of the Republic of Liberia was ordered accepted by the Court. The Court of Civil Appeals affirmed the judgment of the District Court in an opinion dated May 17, 1972 on the same pre-emption grounds specified by the District Court, and likewise did not discuss other issues (Appendix, pages B1-13). Petitioners moved for a rehearing which was denied on June 14, 1972 (Appendix, pages C1-2). Thereafter, petitioners filed an application to the Supreme Court of Texas for a writ of error which was refused on October 4, 1972 (Appendix, pages D1-2). Point I of petitioners' application to the Supreme Court of Texas was that the Court of Civil Appeals erred in applying the pre-emption doctrine (O.R. 12, page 2).[3]

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[3] On October 29, 1971, petitioner Windward Shipping (London) Limited filed a charge against respondent unions with the NLRB. This charge alleged illegal secondary picketing by the unions in violation of Section 8(b)(4)(B) of the Labor Act. The charge was withdrawn voluntarily on November 8, 1971.

Reasons for Granting the Writ

The Texas Court of Civil Appeals has disregarded or misconstrued controlling decisions of this Court on the question of whether or not the Labor Act is applicable to disputes between American unions and foreign owned, foreign flag, foreign crewed ships, a question which this Court has already recognized to be one of importance involving delicate questions of relations between this country and other sovereign powers. On the reasoning of the Texas court any protest picketing by American unions of foreign ships would be arguably subject to the exclusive jurisdiction of the NLRB and thus pre-empted notwithstanding the plain language of this Court's decisions that the Labor Act does not apply to foreign ships or to the conduct of parties to disputes which relate to the internal affairs of such ships. The petitioners, who have been threatened with renewed picketing if their ships again call at United States ports, as well as other foreign shipowners who may be subjected to picketing, would be faced with the futile prospect of seeking relief under an act which this Court has held does not apply to them.

Benz v. *Compania Naviera Hidalgo,* 353 U. S. 138 (1957); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10 (1963); *Incres Steamship Co.* v. *International Maritime Workers Union,* 372 U. S. 24 (1963) and *International Longshoremen's Association, Local 1416, AFL-CIO* v. *Ariadne Shipping Co., Ltd.,* 397 U. S. 195 (1970) hold that the Labor Act does not apply to the internal affairs of foreign ships or to disputes which relate to the internal affairs of foreign ships and thus that no jurisdiction of the NLRB exists which would pre-empt the jurisdiction of state courts to consider such disputes. In this case the facts are straightforward in that the defendant unions were picketing the foreign ships to protest allegedly substandard wages and working con-

ditions of the crews on the ships and, as was stated by union witnesses, the unions' interest was in getting the foreign ship operators to increase the wages and benefits of the crews to American levels so that American ships would be more competitive from a cost point of view. Wages and benefits paid to the crew of a foreign ship are at the very heart of its internal affairs.

The application by the Texas court of the "arguably subject" rule stated in *San Diego Building Trades Council* v. *Garmon, supra,* was singularly inappropriate since the inapplicability of the Labor Act to disputes relating to the internal affairs of foreign ships has been clearly determined by this Court and hence there is no "arguability". There is no reason to defer to the NLRB on the issue of whether particular conduct is either protected or prohibited under the Labor Act unless and until it is determined that the Labor Act is applicable. As was pointed out in the concurring opinion in *International Longshoremen's Association* v. *Ariadne Shipping Co., supra,* there is no effective mechanism whereby a foreign shipowner can obtain a determination from the NLRB as to the applicability or inapplicability of the Labor Act or the protected or unprotected status of a union's conduct.

ARGUMENT

The Texas Court failed to apply the law expressed in controlling decisions of this Court on the inapplicability of the Labor Act in disputes involving foreign ships.

The Texas Court of Civil Appeals reviewed the cases of *Benz* v. *Compania Naviera Hidalgo, supra; McCulloch* v. *Sociedad Nacional, supra; Incres Steamship Co.* v. *International Maritime Workers Union, supra; International Longshoremen's Association* v. *Ariadne Steamship*

Co., supra; and *Marine Cooks and Stewards* v. *Panama S.S. Co.,* 362 U. S. 365 (1960) and concluded from them that if picketing intervenes in an alien seamen's strike or strives to organize the foreign crews of a foreign ship, then the picketing is concerned with matters not "in commerce" and is thus not governed by the Labor Act, but if it is picketing which protests the level of wages and the working conditions on such ships, its "validity" is suggested by this Court's holding in *Marine Cooks and Stewards* v. *Panama S.S. Co., supra,* and "[i]t is, at least arguably, a protected activity under section 7 of the LMRA". Appendix page B 13; 482 S. W. 2d at 682.

The Texas court based its decision on its view that:

> [t]here is still no clear statement of the Supreme Court's position as to whether the NLRB has jurisdiction of, as here, picketing by American *seamen* to protest substandard wages and conditions on foreign vessels. (emphasis in original) Appendix page B 11; 482 S. W. 2d at 681.

A. Review of the Supreme Court Decisions on Preemption in Disputes Involving Foreign Ships.

(1) The *Benz* case, 353 U. S. 138 (1957), grew out of a dispute between a foreign ship and its foreign crew over wages and working conditions. An American union picketed the ship with the purpose of compelling the shipowner to re-employ striking crew members at more favorable wage rates than those agreed upon in the ship's articles (353 U. S. at 141). This Court stated that the question to be decided was whether the Labor Act applies to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port (353 U. S. at 139) and held that it does not. In its decision this Court stated that its study of the Labor Act left it convinced that Congress did

not fashion the Labor Act to resolve labor disputes between nationals of other countries and stated:

> The whole background of the Act is concerned with industrial strife between American employers and employees. 353 U. S. at 143, 144.

As the controversy was not governed by the Labor Act, because it involved a dispute over wages paid to foreign seamen on a foreign ship, the picketing by the American union was held by this Court not to be governed by the Labor Act.

(2) The case of *McCulloch* v. *Sociedad Nacional,* 372 U. S. 10 (1963), arose in the context of a complaint seeking to bar the NLRB from conducting a representation election on a foreign ship, and this Court stated that the question to be determined was ". . . whether the Act as written was intended to have any application to foreign registered vessels employing alien seamen." 372 U. S. at 19. This Court held ". . . we find no basis for a construction which would exert United States jurisdiction over and apply its laws to the internal management and affairs of the vessels. . . ." 372 U. S. at 20.

(3) The *Incres* case, 372 U. S. 24 (1963), decided on the same day as *McCulloch* v. *Sociedad Nacional, supra,* arose in the context of a complaint having been filed in a state court seeking to enjoin an American union from picketing foreign ships manned by foreign crews and from encouraging the crews to refrain from working the vessels. The Court referred to its decision in *McCulloch* v. *Sociedad Nacional, supra,* stating:

> In that case we were immediately concerned with the Board's jurisdiction to direct an election, holding that the Act had no application to the operations of foreign flag ships employing alien crews. Therefore, no different result as to Board jurisdiction

> follows from the fact that our immediate concern here is the picketing of a foreign flag ship by an American union. 372 U. S. at 27.

Again, we deem it highly relevant that this Court, having decided in *Benz, supra,* that the Labor Act did not apply to the maritime operations of foreign flag ships employing foreign seamen, stated clearly that it therefore followed that the Labor Act did not apply to picketing of the ships which was related to the employer-employee relationships on such ships.

(4) The most recent decision by this Court on the question of pre-emption and foreign flag ships, *International Longshoremen's Association* v. *Ariadne Shipping Co.,* 397 U. S. 195 (1970), arose in the context of a complaint filed in a state court seeking to enjoin picketing by an American union of a foreign ship employing foreign seamen. The union was protesting that longshoremen's work in United States ports was being done under substandard wage conditions. This Court stated that the dispute centered around wages to be paid by the foreign ship to American residents who were temporary employees employed to unload the ship. This Court stated that the critical question to be determined was, "... whether the longshore activities of such American residents were within the 'maritime operations of foreign flag ships' which *McCulloch, Incres,* and *Benz* found to be beyond the scope of the Act." 397 U. S. at 200. The Court held that "The American longshoremen's short-term, irregular and casual connection with the respective vessels plainly belied any involvement on their part with the ships' 'internal discipline and order' " *id.* at 200, and that the picketing was thus, under the rule of *San Diego Building Trades Council* v. *Garmon, supra,* " 'arguably subject' to regulation under § 7 or § 8 of the Act" *id.* at 200. The Court expressly reserved from the decision situations where the longshore work is carried out

by a ship's foreign crew pursuant to foreign articles. *id.* at 199,n.4. Even more importantly, the case in no way suggests that protest picketing related to the wage levels of the crew for shipboard duties as in the case at bar would be deemed not to involve the internal affairs of the ship.

B. The Texas Court Erred in Interpreting the Controlling Decisions of This Court and in Relying on Certain Decisions of Lower Courts.

(1) The Texas court held that the picketing by the American unions fell into the category of "area standards" picketing held to be arguably protected by Section 7 of the Labor Act in *International Longshoremen's Association* v. *Ariadne Shipping Co., supra* (Appendix, page B 7, 482 S. W. 2d 679).

In holding that the picketing in the case at bar was arguably protected, notwithstanding that it involved a dispute with a foreign ship, the Texas court relied on the cases of *South Georgia Co., Ltd.* v. *Marine Engineers Beneficial Ass'n.*, 44 CCH Lab. Cas. 26,269 (La. Dist. Ct. 1961) and *Ex Parte George*, 163 Tex. 103, 358 S. W. 2d 590, vacated 371 U. S. 72 (1962), on remand 364 S. W. 2d 189 (Tex. 1963) as well as *Ariadne, supra.* Both *South Georgia* and *Ex Parte George* were decided prior to the Supreme Court's decisions in *McCulloch* and *Incres, supra.* Thus the *South Georgia* case held that the "commerce" requirement of the Labor Act was satisfied by the fact that the foreign vessels picketed in that case were trading in and out of United States ports whereas *Incres* held to the contrary that ". . . maritime operations of foreign flag ships employing alien seamen are not in 'commerce' within the meaning of § 2(6), 29 U. S. C. § 152(6)." 372 U. S. 24, at 27. *Ex Parte George, supra,* had nothing to

do with picketing of foreign ships. It involved a purely domestic dispute between an American union and an American company. We respectfully submit that the Texas court's reliance on these cases was entirely misplaced.

The Texas court in its opinion described this Court's opinion in *International Longshoremen's Association* v. *Ariadne Shipping Co.*, 397 U. S. 195 (1970) with evident care but then proceeded to the conclusion that, as this Court had held in that case that the Labor Act governed protest picketing regarding substandard wages paid to American longshoremen employed temporarily to unload a foreign vessel, it therefore followed that the Labor Act would apply to protest picketing regarding substandard wages paid to foreign seamen employed on the vessel. We respectfully submit that this Court took pains to point out that the reason why the Labor Act did apply in *Ariadne* was precisely because the protest picketing involved allegedly substandard wages paid to the American longshoremen rather than the wages paid to the foreign crew and specifically reserved from its decision the situation of picketing protesting substandard wages paid to the foreign crew because of the direct involvement of the crew with the internal order and discipline of the ship. See 397 U. S. 195 at 199, 200.

We submit that *Ariadne* is compelling authority that, whereas peaceful picketing protesting substandard wages of American longshoremen employed on an occasional basis to unload a foreign ship is governed by the Labor Act because "The American longshoremen's short-term, irregular and casual connection with the respective vessels plainly belied any involvement on their part with the ships' 'internal discipline and order' " 397 U. S. 195 at 200, the exact opposite conclusion must follow if the picketing involves protest of alleged substandard wages paid to

the foreign crew of a foreign vessel whose connection with the vessel is neither short-term, irregular nor casual and who are plainly involved in the internal discipline and order of the vessel.

(2) The Texas court purported to distinguish *Benz, supra,* on the basis of *Marine Cooks and Stewards, supra,* wherein this Court held that picketing by an American union of a foreign flag ship to protest substandard wages constituted a "labor dispute" within the meaning of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101 *et seq.* and that Federal courts were by reason of this Act without jurisdiction to grant an injunction against the picketing. This Court in *Marine Cooks* pointed out that different considerations pertained in construing the applicability of the Norris-LaGuardia Act than were pertinent in construing the Labor Act and said that the decision in *Benz* on the applicability of the Labor Act in no way justified the inference that the Federal courts were empowered to issue injunctions in labor disputes involving foreign flag ships (see 362 U. S. at 369).

The Court in *Marine Cooks* rejected petitioner's argument to the effect that if a "labor dispute" under the Norris-LaGuardia Act was involved, nevertheless the Federal court should have jurisdiction to issue an injunction because the picketing involved an unlawful interference in the internal economy of a foreign vessel, stating:

> Nor does the language of the Norris-LaGuardia Act leave room to hold that jurisdiction it denies a District Court to issue a particular type of restraining order can be restored to it by a finding that the nonenjoinable conduct may "interfere in the internal economy of a vessel registered under the flag of a friendly foreign power." 362 U. S. at 371.

Then, in a footnote which was plainly dictum, the Court went on to say that the American union was not interested in the internal economy of the ship but rather in preserving job opportunities for themselves and concluded that "the dispute was domestic". We submit that while the conclusion that the dispute was "domestic" may have been relevant for Norris-LaGuardia Act purposes it is irrelevant for Labor Act purposes. Indeed, we find the statement that the unions "were not interested in the internal economy of the ship" when they were protesting the level of wages and working conditions on the ship rather hard to follow.

The record in the case at bar makes it abundantly clear that the unions intended in the present picketing situation to force foreign ships to pay wages as high as those paid on American ships, so that American ships would be more competitive at which time the American unions would cease their picketing activities against foreign ships (O.R. 2B, page 158). Indeed one of the union representatives testified that the unions' interest in conducting the picketing in the case at bar was to get the foreign flag shipowners to increase the wages and improve the working conditions of the crews so that the American ships would be more competitive from a cost point of view and so there would be more jobs for American seamen (O.R. 2B, pages 189-191). Any argument that such picketing is not related to the internal economy of the ships which were picketed would be, we submit, completely untenable.

Lest there might have been any latent doubt that the decision in *Marine Cooks* somehow limited this Court's earlier decision in *Benz*, this Court in *McCulloch, supra*,

stated categorically that the *Marine Cooks* case should not be taken as any limitation of the earlier *Benz* holding (372 U. S. at 18). Thus, we submit that the Texas court erred in purporting to apply the rationale of this Court in *Marine Cooks* to a question of the applicability of the Labor Act.

There remains to be discussed the reliance by the Texas court on the related United States Court of Appeals cases of *Madden* v. *Grain Elevator, Flour and Feed Workers, I. L. A., Local 418*, 334 F. 2d 1014 (7th Cir. 1964), *cert. denied* 379 U. S. 967 (1965), and *Grain Elevator, Flour and Feed Workers, I.L.A., Local 418* v. *NLRB*, 376 F. 2d 774 (D. C. Cir.), *cert. denied* 389 U. S. 932 (1967). In these cases the union was urging that *Incres* precluded the granting of relief sought by the NLRB on a charge filed by an American company for violation by the union of the secondary boycott provisions of the Labor Act,[4] in a situation where the union, which had a dispute with a foreign shipowner, imposed an illegal secondary boycott on the American company. The Courts of Appeals correctly held that the *Incres* case did not bar an American employer from seeking relief through the NLRB against a boycott by an American union involving employees working in a domestic plant of the American employer (334 F. 2d at 1019, 1020).

We have no quarrel with the decisions in these cases, but they offer no basis whatsoever for limiting the *Incres* decision in the fashion which the Texas court concludes that they do.

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[4] § 8(b)(4)(i) and (ii)(B) of the Act, 29 U. S. C. § 158(b)(4)(i) and (ii)(B).

Conclusion

We submit that where an American union is involved in a dispute with a foreign shipowner which relates to the internal affairs of a foreign ship, as is undeniably the case here, the Labor Act is not applicable to govern the conduct of either party to the dispute and no activity of either party is either prohibited or protected by that Act, and the parties to such dispute are free to seek whatever relief, if any, may be available to them in the state courts. As pointed out in *Benz, supra,* "The whole background of the Act is concerned with industrial strife between American employers and employees." 353 U. S. at 143, 144. We urge that this petition for a writ of certiorari be granted.

Respectfully submitted,

Breck P. McAllister,
James V. Hayes,
Counsel for Petitioners.

Robert S. Ogden, Jr.
Vernon E. Vig
Joseph E. Fortenberry
Donovan Leisure Newton & Irvine
Of Counsel.

APPENDIX A

JUDGMENT, INCLUDING NOTICE OF APPEAL. FILED: December 9, 1971. RAY HARDY, District Clerk, Harris County, Texas. By J. Wright, Deputy. JUDGMENT ENTERED: Volume 829, Page 94, General Minutes District & Domestic Relations Courts, in and for Harris County, Texas.

IN THE

DISTRICT COURT OF HARRIS COUNTY, TEXAS

164TH JUDICIAL DISTRICT OF TEXAS

No. 889,002

WINDWARD SHIPPING (LONDON) LIMITED & SPS BULKCARRIERS CORP.

VS.

AMERICAN RADIO ASSOCIATION AFL-CIO, et al

No. 889,003

(Consolidated Under No. 889,002)

WESTWIND AFRICA LINE, LTD.

VS.

AMERICAN RADIO ASSOCIATION AFL-CIO, et al

JUDGMENT

The above cases having been consolidated by agreement of the parties, came on for hearing on the 8th day of

November, 1971, when came the Plaintiffs by their attorneys of record and also came the Defendants by their attorneys of record and all parties announced ready for trial on the Plaintiffs' Motion For Temporary Injunction; and the trial having proceeded on November 8th and 9th, 1971, on Plaintiffs' Application For Temporary Injunction, the hearing was then recessed by agreement of the parties and approval of the Court until November 29, 1971, at which time the hearing reconvened; and at said time all parties announced that they had agreed to request the Court to proceed to hear the case on its merits to final decision. Thereupon, the case was continued on trial on the Plaintiffs' Application For Permanent Injunction as prayed for in their amended petition until November 30, 1971, when all parties rested and the case was taken under advisement by the Court with permission granted to all parties to file written briefs.

After consideration and study of the evidence, stipulations of the parties and the briefs filed, the Court is of the opinion and so finds that the issues raised in these consolidated cases are arguably within the jurisdiction of the National Labor Relations Board and that for such reason are pre-empted by the Board and this Court is without jurisdiction to proceed further.

It is accordingly ORDERED, ADJUDGED and DECREED that these consolidated causes be and they are hereby DISMISSED.

It is further ORDERED, ADJUDGED and DECREED that all taxable costs of Court incurred herein be taxed against the Plaintiffs.

To all of which the Plaintiffs and each of them in open Court duly excepted and gave notice of appeal to the Court of Civil Appeals of the State of Texas.

Appendix A

ENTER this 10th day of December, 1971.

WARREN P. CUNNINGHAM
Judge Presiding

APPROVED AS TO FORM:

BEN L. REYNOLDS
W. D. DEAKINS, JR.
Attorneys for Plaintiffs
Windward Shipping (London)
Limited & SPS Bulkcarriers

W. D. DEAKINS, JR.
Attorney for Plaintiff
Westwind Africa Line, Ltd.

W. A. COMBS
Attorney for Defendants

HERMAN WRIGHT
BERTRAM PERKEL
Attorneys for Defendants

APPENDIX B

COURT OF CIVIL APPEALS

FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

AFFIRMED, and Opinion filed May 17, 1972.

No. 635

WINDWARD SHIPPING (LONDON) LIMITED, et al,

Appellants

vs.

AMERICAN RADIO ASSOCIATION AFL-CIO, et al,

Appellees

Appeal from 164th District Court of Harris County

In October of 1971 the cargo vessels Northwind and Theomana, both of Liberian registry, were docked at the Port of Houston for the purpose of loading and unloading cargo. American Radio Association, AFL-CIO and five other deep sea maritime unions, acting in concert, established picket lines which longshoremen and other workmen would not cross to service such vessels. The owners of the vessels filed suit in the district court in Harris County to enjoin permanently such picketing. The district court, after hearing evidence, dismissed the owners' suit, concluding that the court was without jurisdiction because of pre-emption by the National Labor Relations Board. The owners have appealed. We affirm the trial court's judgment of dismissal.

The basic facts of the case were established by stipulation or uncontroverted evidence. The vessels in question

carry cargo between United States ports and foreign ports. They do not carry cargo from one port in the United States to another port in the United States. The crews and officers of the vessels are foreign nationals. There is no labor dispute between the owners of the vessels and their crews or the foreign unions who represent them or on the foreign contracts under which they work. The picketing unions neither have nor claim the right to represent the crews, nor do they seek to obtain such right. None of the crew members are members of the picketing unions. The picketing has been peaceful and without violence or threat of violence.

Four pickets commenced picketing the Theomana at the Port of Houston on October 28, 1971, and four began picketing the Northwind the following day. Signs carried by the pickets bore the following message:

> "ATTENTION TO THE PUBLIC
>
> The wages and benefits paid seamen aboard the vessel THEOMANA (NORTHWIND) are substandard to those of American seamen. This results in extreme damage to our wage standards and loss of our jobs. Please do not patronize this vessel. Help the American seamen. We have no dispute with any other vessel on this site." (Parenthesis added)

The signs bore the names of the picketing unions.

The pickets did not speak to anyone. When inquiry was made of them they handed out literature in the following language:

> "TO THE PUBLIC
>
> American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

A strong American Merchant Marine is essential to our national defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.

PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.

Our dispute here is limited to the vessel picketed at this site, the SS ".

This literature, too, had on it the names of the picketing unions.

The refusal of longshoremen and others to cross the picket lines resulted in damage to the vessels' owners which the unions agree is incalculable.

The first step taken to stop the picketing was the filing, in behalf of the owner of the Theomana, of a complaint with the NLRB charging the unions with secondary picketing. The next day suit was filed in behalf of such owner in the district court of Harris County seeking temporary and permanent injunction. The petition in that suit also alleged that the unions were guilty of secondary picketing. The complaint with the NLRB was voluntarily withdrawn by the complainant. The pleadings in the district court of Harris County were amended. Those pleadings as amended alleged, in behalf of the owners of both vessels, that the picketing by the defend-

ant unions was for the purpose of inducing the owners to breach their contracts with their crews and the foreign union representing those crews. It was alleged that such activity was in violation of Tex. Rev. Civ. Stat. Ann. art. 5154d, sec. 4 (1947) and was a tort under Texas law.

The unions answered to the suit filed by the owners, asserting the defenses that: (1) The jurisdiction over the subject matter of the dispute was pre-empted to the NLRB by the Labor Management Relations Act, 29 U. S. C. sec. 151, et seq. (1947). (2) The Norris-La-Guardia Act, 29 U. S. C. sec. 101, et seq. (1932), prohibited the granting of the injunction sought. (3) The activities sought to be enjoined were protected by constitutional guaranties of free speech. (4) Tex. Rev. Civ. Stat. Ann. art. 5154d, sec. 4 (1947), if applicable to their activities, would be unconstitutional. (5) The owners were without clean hands in that their conduct was contrary to the public policy of the United States to promote the merchant marine, as pronounced in 46 U. S. C. sec. 1101 and sec. 1241 (1970). The trial court sustained the first of those asserted defenses and did not make findings of fact or conclusions of law relating to the others. We shall likewise confine our discussions to the jurisdictional preemption question.

Since San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959), state jurisdiction in cases of labor disputes has been compelled to yield to the jurisdiction of the NLRB if the activities complained of are arguably either protected by section 7 or prohibited by section 8 of the NLRA as amended by the LMRA. The determination of whether activity in fact is or is not protected or proscribed by the statute is initially for the NLRB. Failure of the Board to determine the status of the activity does not pass jurisdiction to the state courts. After the

Garmon case state jurisdiction notwithstanding federal pre-emption rules is confined to (1) those cases involving libel, Linn v. United Plant Guard Workers Local 114, 383 U. S. 53 (1966), and other matters "deeply rooted in local feeling or responsibility", Garmon, supra; (2) cases in which jurisdiction has been ceded to the state by the NLRB by virtue of 29 U. S. C. sec. 160(a) (1959); (3) cases in which the disputed activity is a "merely peripheral concern" of the LMRA, Garmon, supra, (e.g., breach of contract, damages for wrongful expulsion from a union); (4) cases in which the NLRB refuses jurisdiction; and (5) those cases involving violence, e.g., International Union, Etc. v. Russell, 356 U. S. 634 (1958); International Ass'n of Machinists v. Gonzales, 356 U. S. 617 (1958); United Const. Workers, Etc. v. Laburnum Const. Corp., 347 U. S. 656 (1953); Youngdahl v. Rainfair, Inc., 355 U. S. 131 (1957); United Auto., A. & A. I. W. v. Wisconsin Emp. Rel. Bd., 351 U. S. 266 (1955). The courts of Texas have adhered to these principles. Ex Parte Dilley, 160 Tex. 522, 334 S. W. 2d 425 (1960); Carpenters & Joiners Local Union No. 1097 v. Hampton, 457 S. W. 2d 299 (Tex. Civ. App.—Tyler 1970, no writ).

This Court's primary inquiry, then, is whether the appellees' picketing here in question was arguably prohibited or protected under the LMRA (29 U. S. C. sec. 157 and sec. 158). As appellants point out, appellees' picketing carefully remained within the guidelines for permissible picketing on the premises of a secondary employer promulgated in Sailor's Union of the Pacific, 92 N. L. R. B. 547 and adopted in Local 761, Inter. U. of E., R. and M. Wkrs. v. NLRB, 366 U. S. 667 (1961). These principles, commonly referred to as the "Moore Dry Dock Rules", consider picketing of a secondary employer's

premises lawful primary activity when it meets these conditions:

(1) The picketing is strictly limited to times when primary employees are present at the premises of the secondary employer or at the common premises.

(2) The primary employer is engaged in his normal business at the picketed premises at the time of the picketing.

(3) The picketing is limited to places reasonably close to the locations on the premises where the employees of the primary employer are at work.

(4) The picketing clearly discloses that the dispute is with the primary employer alone.

(5) The primary employer has no separate place of business at which a reasonable opportunity is afforded to reach his employees by picketing.

In the instant case the evidence reveals that appellees picketed only when the vessels of the appellants, primary employers, were dockside. Secondly, when picketed the ships were being loaded and unloaded, part of the usual operation of cargo ships and the normal business of the primary employers. Moreover, the picketing was limited to the dock at which the vessels were berthed. Further, the signs carried by the picketers clearly restricted the picketing to the primary employer. And, the two ships were the only reasonably accessible places of business to which the unions could direct their attention and efforts. Accordingly, appellees were not engaged in a secondary boycott. No other violation of section 8 is intimated by the parties and none other appears from the record.

We must, then, consider whether appellees' conduct was arguably protected under section 7 of the LMRA.

Appendix B

Section 7 is in the following language:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title."

Peaceful picketing has repeatedly been held protected by this section of the NLRA (amended by LMRA, 29 U. S. C. sec. 157). Garner v. Teamsters, Chauffeurs and Helpers, Etc., 346 U. S. 485 (1953); Carter Carburetor Corp. v. National Labor R. Board, 140 F. 2d 714 (8th Cir. 1944); National Labor Relations Board v. Thayer Co., 213 F. 2d 748 (1st Cir. 1954); Edir, Inc. d/b/a Wolfie's v. Club & Restaurant Employees and Bartenders' Union Local No. 133, AFL-CIO, et al, 159 N. L. R. B. 72 (1966); Sears-Roebuck & Company v. Retail Store Employees' Union, Local 345, AFL-CIO, 168 N. L. R. B. 126 (1967). And see Cox, The Right to Engage in Concerted Activities, 26 IND. L. J. 319 (1951). The Supreme Court has expressly recognized that a union's peaceful picketing to protest wage rates below established area standards arguably constitutes protected activity under section 7. International Longshore. Local 1416 v. Ariadne Shipping Co., 397 U. S. 195 (1970), and cases cited therein. This is the now well-recognized "area standards" picketing.

One case is persuasive authority in support of the trial court's order of dismissal. In South Georgia Co., Ltd.

v. Marine Engineers Beneficial Ass'n., 44 CCH Lab. Cas. 26,269 (La. Dist. Ct. 1961) picketing of a foreign ship with a foreign crew by an American union to protest loss of jobs by U. S. seamen from use of that ship to transport cargo purchased by Indonesia under the Agricultural Trade Development and Assistance Act was held to be arguably protected by section 7 of the L. M. R. A.

In Ex Parte George, 163 Tex. 103, 358 S. W. 2d 590 (1962), vacated 371 U. S. 72 (1963), on remand 364 S. W. 2d 189 (Tex. Sup. 1963), an American maritime union which represented unlicensed crew members on American Oil Company vessels was involved in a labor dispute with that company. The union picketed the main gate and parking lot gate at a coastal refinery operated by a wholly-owned subsidiary of American Oil. Workers at the refinery were represented by a separate union. Despite a finding, supported by the record, that the union's purpose was to induce the violation of American Oil's existing contract with the refinery worker's union (a violation of Art. 5154d here in question), the U. S. Supreme Court held that the maritime union's picketing was arguably protected by section 7.

In this case with facts not so gross as those in Ex Parte George, there appears no persuasive reason to hold contrary to the Supreme Court's holding in George. In fact, appellants do not argue that the appellees' picketing is not of a character sufficient to fall within section 7's protection. Rather, they contend that the LMRA "does not extend to the maritime operations of foreign-flag ships employing foreign aliens, and that American union activity which affects the internal affairs of the ship and its foreign crew is not protected by the Act." Appellants base their contention on three cases: Benz v. Compania Naviera Hidalgo, S.A. 353 U. S. 138 (1957); McCulloch

v. Sociedad Nacional, Etc., 372 U. S. 10 (1963); and Incres Steamship Co. v. International Maritime W. U., 372 U. S. 24 (1963). All three of those cases involved foreign-owned and registered ships with alien crews under foreign articles. In Benz the crew members went on strike and their cause was taken up successively by three different American unions. In McCulloch an American union petitioned for certification as the representative of foreign crewmen and the NLRB ordered an election. In Incres an American union picketed as part of its campaign to organize foreign crewmen. In each case the Supreme Court held that the NLRA, as amended, does not apply to foreign-registered ships employing alien seamen. This is so because the NLRB's jurisdiction is based upon circumstances "affecting commerce" and the Court concluded that maritime operations of foreign-flag ships employing alien crewmen are not "in commerce" as that term is contemplated by section 2(6) (29 U. S. C. sec. 152(b) (1947)).

McCulloch and Incres were decided on the basis of Benz. In Marine Cooks and Stewards, supra, the Supreme Court, while involved in a construction of the Norris-LaGuardia Act, drew an important distinction between the facts in Benz and those in Marine Cooks. The Court noted that in Benz an American union, to which none of the alien crew members belonged, had a substantial, immediate interest in the "internal economy" of the ship. The Marine Cooks case involved facts essentially the same as now before us (except that picketing was by boat and not at the dock of consignee, although that was expressly threatened). Justice Black, speaking for eight justices (Justice Whittaker dissented on a separate issue), viewed the union members' interest there as being "in preserving job opportunities for themselves in this country," not in the "internal economy" of the foreign vessel. They were

picketing on their own behalf and not for the benefit of foreign employees. The opinion labeled the dispute as domestic even though the employer was foreign.

The Benz case was distinguished from a case factually identical to the present case on the basis of the distinction noted by Justice Black in Marine Cooks. South Georgia Co., Ltd., v. Marine Engineers Beneficial Ass'n, supra. The Court in South Georgia characterized Benz as involving only "an internal dispute on a foreign ship." In Madden v. Grain Elevator, Flour & Feed Mill Wkrs., Etc., 334 F. 2d 1014 (7th Cir. 1964) the Seventh Circuit rejected a union's contention that, based upon Incres, the NLRB lacked jurisdiction of a dispute involving union members' refusal to unload ships so as to compel their employer to cease doing business with a Canadian shipping company. In passing on a contempt order arising from a secondary boycott complaint, the Court found that no attempt was being made to apply the NLRA to "the internal management or affairs" of the vessels involved. In a subsequent chapter of the same dispute the D. C. Circuit sustained the finding of the Seventh Circuit that Incres was inapplicable. Grain Elevator, Flour and Feed Mill W., I. L. A., Loc. 418 v. NLRB, 376 F. 2d 774 (D. C. Cir. 1967). These cases construe the Incres case to hold not that the NLRB lacks jurisdiction of *any* "maritime operations" of a foreign ship and crew, but that the Board lacks jurisdiction over the "internal affairs" of a foreign ship and crew. This is a more narrow and precise area of activity and one which hints of exclusion of the usual elements of a cargo-carrying operation and focuses only upon crew-owner relations.

In 1970 the Supreme Court was presented with a case of union picketing to protest the substandard wages paid by foreign-flag vessels to American longshoremen in

American ports. International Longshore. Local 1416 v. Ariadne Shipping Co., supra. The question of pre-emption was squarely at issue. Lower courts had held no pre-emption because the NLRB lacked jurisdiction. McCulloch and Incres were the authority for that holding. The Supreme Court reversed and held that the longshore activities of American longshoremen were not within the maritime operations of foreign-flag vessels. The Court carefully pointed out that the construction of the federal statute in Benz, McCulloch and Incres,

> ". . . was addressed to situations in which Board regulation of the labor relations in question would necessitate inquiry into the 'internal discipline and order' of a foreign vessel . . .".

The Court concluded that the functions of the American longshoremen did not constitute involvement with the ships' "internal discipline and order". Application of American labor statutes to resolve a conflict over wages paid to American longshoremen thus would not interfere with the foreign ships' internal affairs. Consequently the longshoremen's operations were "in commerce" and could be subject to the board's jurisdiction.

There is still no clear statement of the Supreme Court's position as to whether the NLRB has jurisdiction of, as here, picketing by American *seamen* to protest substandard wages and conditions on foreign vessels. The picketing in the Ariadne case could not have been any less destructive to the cargo-carrying business of the ships than the protracted picketing and conflict in Benz. So, it seems that the terms "internal affairs" and "internal order and discipline" must refer to the relationship between crew and employer and not to the carrying-on of the business for which the vessel is employed (a matter between shipowner and shipper). This construction has

support in the language employed by the Court in the Ariadne case where the Court refers to the crucial term "internal affairs" of the foreign ship as affairs "which would be governed by foreign law," i.e., (see footnote 4) the foreign ships' articles. Ships' articles concern such matters as seamen's conduct and obedience, wages, seamen's liability for cargo damaged or embezzled, competency in performance of seamen's duties and airing of seamen's grievances. See, e.g., 46 U. S. C. sec. 713 (1946). The issue in McCulloch and Incres was representation of foreign seamen. In Benz it was picketing to support a strike by the foreign crewmembers. To allow American unions to intercede in those instances would clearly be to allow interference with the internal order, discipline and affairs of a foreign ship. In Ariadne the Court confronted a situation involving American workers hired by foreign ships to serve, not as seamen, but as longshoremen. As noted before, the Court held that the longshoremen's activities performed by Americans were not an element of the "foreign ships'" internal affairs.

Ariadne differs from the instant case in at least two respects. First, it dealt with longshoremen rather than seamen. Further, it concerned picketing in regard to wages to be paid to American workers who were employed by foreign employers. The casual connection between American longshoremen's duties and the foreign vessels is what excluded those functions from the reach of the term "internal discipline and order." The Court expressly reserved the question of longshore vork performed by foreign crewmen. But in this case there are no American residents employed by foreign ship owners. The protest is not directed to allegedly substandard wages paid by foreign shipowners to then-employed American seamen, but to allegedly substandard wages paid to foreign seamen, with a concurrent request to the public not to

patronize the foreign ships. There is no direct interference with the relationship between employer and crewmen. Any direct interference is between the consignee and the shipowner, or the shipowner and the stevedore company. The fact that appellees are seamen and not merely longshoremen cannot indicate greater involvement in the internal affairs of the ships because none are employed on those ships.

It is important also to note that the Court in Ariadne focused upon the effect of longshore work upon the ships' internal affairs and not upon the purpose and intent of the picketers. The purpose of the activity in question is not of controlling significance in deciding the question of jurisdiction of the activity. (See, e.g., Chief Justice Calvert's dissenting opinion in Ex Parte George, 358 S. W. 2d 590, 607). If the picketing intervenes in an alien crewmen's strike or strives to organize those crewmen it constitutes involvement with matters not "in commerce". If it but voices a complaint as to foreign wages and urges the public not to patronize foreign vessels it does not engage in matters outside of commerce. It is peaceful picketing, publicizing a labor dispute, of such a character that its validity is suggested by the Court's holding in the Marine Cooks case, supra. It is, at least arguably, a protected activity under section 7 of the LMRA. As such, it is an activity as to which the exclusive jurisdiction to determine its propriety has been preempted to the NLRB. Upon that basis the trial court properly dismissed the plaintiffs' suit for want of jurisdiction.

Affirmed.

/s/ Bert H. Tunks
Chief Justice

Judgment rendered, and Opinion filed May 17, 1972.

APPENDIX C

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the Fourteenth Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D., 1971, present BERT H. TUNKS, Chief Justice, and Associate Justices, John M. Barron and Sam D. Johnson.

No. 635

From Harris County

Trial Court No. 889,002

Opinion by Tunks, CJ

In the cause

WINDWARD SHIPPING (LONDON) LIMITED, et al

Appellants,

vs.

AMERICAN RADIO ASSOCIATION AFL-CIO, et al

Appellees,

---

the following order was rendered June 14, 1972:

"It is ordered that appellants' motion for rehearing be overruled."

Appendix C

I, THELMA MUELLER, Clerk of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of Court's order rendered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book I, Page 381.

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of said Court at Houston this 13th day of December A. D., 1972.

THELMA MUELLER
Clerk

APPENDIX D

SUPREME COURT OF TEXAS

From Harris County, Fourteenth District.

No. B-3484.

WINDWARD SHIPPING (LONDON) LIMITED, et al.

vs.

AMERICAN RADIO ASSOCIATION AFL-CIO, et al.

October 4, 1972.

Application of petitioners for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District, together with their motion to expedite the hearing of said application, having been duly considered, it is ordered that said motion be, and hereby is, granted, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Windward Shipping (London) Limited et al., and their surety, Allied Insurance Company, pay all costs incurred on this application.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the order of the Supreme Court of Texas

in the case of Windward Shipping (London), Limited, et al. vs. American Radio Association, AFL-CIO, et al., No. B-3484, From Harris County, Fourteenth District, as the copy of such order appears in the minutes of said Court under the date of October 4, 1972.

In Testimony Whereof, Witness my hand and the Seal of the Supreme Court of Texas, at the City of Austin, on this 5th day of December, 1972.

Garson R. Jackson
Garson R. Jackson,
Clerk

APPENDIX E

Paragraph VII of Defendants' Answer to Plaintiffs' First Amended Petition for Injunction, Filed November 8, 1971:

VII.

Defendants would show that this Honorable Court may not grant the relief requested by the Plaintiffs herein because jurisdiction over the subject matter of this dispute and over the parties thereto does not lie within the province of this Honorable Court but is pre-empted to the National Labor Relations Board by the National Labor Relations Act (29 U. S. C. A. §151, et seq.). In this regard Defendants would show that Plaintiff Windward Shipping London Limited filed an unfair labor practice charge before the National Labor Relations Board on October 29, 1971, against all of the same parties who are Defendants here. (Case No. 23-CC-416, a copy of which is attached to this Answer).

APPENDIX F

From Labor Management Relations Act, 29 United States Code:

§ 141. Short Title; Congressional Declaration of Purpose and Policy

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. June 23, 1947, c. 120, § 1, 61 Stat. 136.

§ 151. Findings and Declaration of Policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the

intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and mem-

bers have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 136.

§ 157. Right of Employees as to Organization, Collective Bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

§ 158. UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that

at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain

with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the pur-

pose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an em-

ployer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract

or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor prac-

tice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title. July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub.L. 86-257, Title II, § 201(e), Title VII, §§ 704(a)-(c), 705(a), 73 Stat. 525, 542, 545.

Texas Revised Civil Statutes

Art. 5154d. Picketing

Sec. 4. It shall be unlawful for any person, singly or in concert with others, to engage in picketing, the purpose of which, directly or indirectly, is to secure the disregard, breach or violation of a valid subsisting labor agreement arrived at between an employer and the representatives designated or selected by the employees for the purpose of collective bargaining, or certified as the bargaining unit under the provisions of the National Labor Relations Act.

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1061

WINDWARD SHIPPING (LONDON) LIMITED, *et al.*,

Petitioners,

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinions Below

The order of the Supreme Court of Texas dated October 4, 1972, denying petitioners' application for a writ of error, and which determined, "that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals", is set forth in petitioners' Appendix D.

The opinion of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, dated May 17, 1972 is reported at 482 S.W. 2d 675, and is set forth in petitioners' Appendix B.

The unreported opinion and order of the District Court of Harris County, 164th Judicial District of Texas, dated December 10, 1971, is set forth in petitioners' Appendix A.

Jurisdiction

The alleged jurisdictional requisites are set forth in the petition at page 2.

Question Presented

Whether the Labor Management Relations Act as amended, 61 Stat. 136, 29 U.S.C. § 141 *et seq.*, preempts state jurisdiction to enjoin peaceful and truthful picketing of foreign flag vessels in United States ports, protesting that the wages and benefits paid and provided seamen aboard such vessels are substandard to those of American seamen resulting in extreme damage to American seamen wage standards and benefits, loss of jobs and employment opportunities here in the United States and further requesting persons not to patronize such vessels, as a consequence of which, American employees of American employers refused to patronize or work upon the picketed vessels.

Statutes Involved

The relevant statutory provisions are: Labor Management Relations Act, §§ 7 and 8(b)(4); 29 USC §§ 157 and 158(b)(4). The text of these provisions is set forth in petitioners' Appendix F (pages F3, F6-F8).

Statement of the Case

The background facts

The six respondent labor organizations are the major deep sea American maritime unions representing American seamen. On October 27, 1971, their representatives met to discuss what lawful action could be taken to arrest the declining employment opportunities and preserve those which remained, for their members here in the United States, which employment opportunities were then at its lowest point in twenty years with their members having lost over 50% of their former job opportunities in the last few years (O.R. 2B, page 142).[1]

The representatives present at such meeting realized that foreign flag vessels paying wages and providing benefits to their seamen substantially less than those enjoyed by American seamen on United States flag vessels, were able to underbid American flag ships for the transportation of American sea borne commerce. Conversely, the declining American flag fleet, paying wages and providing benefits to American seamen in accordance with the standards in the United States, had higher operating costs and were not able to profitably compete against these foreign flag vessels for American sea borne commerce (O.R. 2B, pages 119-125). Such representatives further recognized that the consequences of the foregoing had been a long and constant period of decline in the number of job opportunities available for American seamen here in the United States aboard American flag vessels from slightly better than 93,000 to approximately 30,000 at present (O.R. 2B, pages 116-119). Commensurate with the foregoing, had been a decline in the amount of American sea borne commerce carried in American flag vessels from 43% of such commerce in 1951,

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[1] Citations are to the original record set forth in the petition, p. 4, fn. 2. And references demonstrated by letters and numbers will be identical to those utilized by petitioners in such fn. 2.

to less than 5% of such commerce, notwithstanding during the same period American sea borne commerce had increased almost 300% (O.R. 2B, pages 119-20).

Accordingly, the respondent unions, who over the years already had reduced their manning scales and other standards in an attempt to help their American flag employers meet the foreign flag competition for American sea borne commerce (O.R. 2B, pages 184-185, 187-188, 224, 227), decided to act together as a committee (the "Committee") to bring this problem to the attention of the American public and ask for their help (O.R. 2B, pages 143, 183-185, 200-201, 225-226).

After arriving at the obvious conclusion that the lower wages and benefits being paid and provided to foreign seamen on foreign flag vessels, which were drastically substandard to those being paid American seamen aboard American flag vessels,[2] conferred an enormous advantage to foreign flag vessels carrying American sea borne commerce, with most serious adverse effects upon the job opportunities for American seamen on American flag vessels, the Committee decided to take lawful steps to protect the jobs and standards of their members. The question of what specific lawful steps were to be taken was referred to counsel (O.R. 2B, pages 142-148, Resp. Exhibit 8).

Counsel advised the Committee it could engage in peaceful publicity picketing to bring this problem to the attention of the American public and ask them not to patronize the picketed vessels. In addition, counsel prepared the appropriate language for the picket signs,

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[2] An Able Bodied seaman aboard the S.S. Northwind under the contract of employment, articles of agreement and foreign bargaining agreement, base pay is $68.10 per month (O.R. 2A, pages 88-90, stipulation exhibits), contrasted to an Able Bodied American seaman aboard an American flag vessel base pay of $528.46 per month (O.R. 2B, page 108, stipulation exhibit NMU collective bargaining agreement).

literature to be used for distribution and written instructions (O.R. 2B, page 148, Resp. Exhibit 8). The Committee accepted counsel's advice and collectively decided to do precisely what counsel recommended. Each participating union would advise their own membership of the planned activity and no participating union had the authority to speak for the Committee as a whole or vary its written instructions without the written consent of the Committee (*ibid.*).

Representatives of the Committee then went to various ports in the United States to personally carry out the Committee's instructions and took with them the picket sign language, written instructions and literature to the places where it was decided the initial picketing would take place (O.R. 2B, pages 148-150, 179-180, 197-198). Further, leaflets were prepared for distribution to the general public at home offices of certain shippers and shipping companies and publicity of the issues via all media, was undertaken (O.R. 2B, pages 162, 170-173).

The various representatives of respondents' union members of the Committee, in turn followed precisely their instructions and dispatched volunteer pickets to selected sites with the authorized picket signs and leaflets. Pickets were instructed to merely walk the picket line, speak to no one and hand out the authorized leaflets (O.R. 2B, pages 181, 197-198, 198-200). The pickets in turn followed these instructions to the letter. They walked their assigned area with the authorized signs, spoke to no one and conducted themselves orderly and peacefully and distributed the authorized literature (O.R. 2B, pages 208-211, 212-215, 217-218).

The picketing of the S.S. *Theomana* and *Northwind* at Houston[3]

On October 28 and 29, 1971, respectively, respondents began picketing petitioners' two foreign flag vessels, the

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[3] The relevant facts following, as to what transpired at Houston, were stipulated by the parties (O.R. 2, pages 15, 24, Resp. Exhibit 1; O.R. 2B, pages 218, 219).

THEOMANA and NORTHWIND with signs bearing the following legend:

> "ATTENTION TO THE PUBLIC
>
> The wages and benefits paid seamen aboard the vessel THEOMANA (NORTHWIND) are substandard to those of American seamen. This results in extreme damage to our wage standards and loss of our jobs. Please do not patronize this vessel. Help the American seamen. We have no dispute with any other vessel on this site.
>
> Americon Radio Association, AFL-CIO
>
> International Organization of Master Mates and Pilots AFL-CIO
>
> National Marine Engineers Beneficial Association AFL-CIO
>
> National Maritime Union of America, AFL-CIO
>
> Radio Officers Union of the United Telegraph Workers AFL-CIO
>
> Seafarers International Union of North America AFL-CIO (O.R. 2, page 15, Resp. Exhibit 1, paragraph 4)"

The picket line at all times was "peaceful and without violence or threat of violence" and was maintained by four men who patrolled along the dock in a contiguous area adjacent to the vessel picketed (*ibid.*, Respondents' Exhibit 1, paragraphs 4 and 5). Each of the pickets carried the above sign, spoke to no one and handed out the same literature as is annexed to respondents' Exhibit 1, *supra* (*ibid.* paragraph 4, Respondents' Exhibit 1, O.R. 2B, pages 218-219).[4]

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[4] Similar Committee picketing activity as at bar, and also at Houston, was also the subject of litigation in the United States District Court in Houston wherein an injunction request was denied, the denial affirmed by the Fifth Circuit and petition for certiorari

Respondents expressed no interest, nor made oral or written demand upon petitioners' companies seeking to represent any of their employees (O.R. 2, page 24). And it was further stipulated that petitioners had no labor dispute with their employees and that respondents' picketing was not in support of any problem concerning petitioners' employees and petitioners as their employers (O.R. 2, page 15, Resp. Exhibit 1, paragraph 9). It was further stipulated that the petitioner Windward Shipping had invoked the jurisdiction of the NLRB on October 29, 1971, when it was charged that respondents, by picketing the foreign flag vessel, THEOMANA as aforesaid, were engaged in an unlawful secondary boycott within the meaning of 8(b)(4)(B) of the Labor Management Relations Act, (Act), 29 USC 158(b)(4)(B) (*ibid.* par. 8).

In addition to filing such charge with the NLRB, and as found by the court below, the next day petitioner Windward instituted an action in the District Court of Harris County, Texas, seeking a temporary and permanent injunction restraining respondents from picketing the sub-

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denied by this Court. *Port of Houston Authority of Harris County, Texas* v. *International Organization of Masters, Mates, etc.*, 456 F. 2d 50 (1972), cert. den. — U. S. —, 81 LRRM 2391. The Circuit's recitation of respondents' conduct in the case before it, demonstrates identical conduct engaged in at bar, to wit:

> "The unions were jointly engaged in peacefully picketing selected foreign vessels in the Houston Port. At the time of the hearing, picket lines consisting of four pickets were being maintained at three of the forty-nine docks in the port.
>
> The pickets carried placards and also handed out literature. The effort was to call the attention of the public to the declining job opportunities for the American seaman caused by the use of foreign vessels, and to the substandard wages and working conditions on such vessels. The public was asked not to patronize the foreign vessels. The result was that other workers refused to cross the picket lines and the foreign vessels could not be unloaded." (*ibid.* 52)

ject vessel, alleging that respondents were guilty of secondary picketing (Petitioners' Appendix B, page B3).

Thereafter the complaint with the NLRB was voluntarily withdrawn by said petitioner and the pleadings in the District Court amended to allege that the purpose of respondents' picketing was to induce the vessels' owners to breach their contracts with their crews and foreign unions representing such crews in violation of Texas local law (petitioners' Appendix B, pages B3 and 4).

As testified to by petitioners' witnesses, when longshoremen employed by the American stevedoring company saw the picket lines adjacent to the picketed vessels and read the literature distributed, they refused to patronize and work upon the picketed vessels (O.R. 2, pages 26-27, 30-31, 35, 49).

It was alleged at trial that as a consequence of the picketing with only partial cargo aboard, the picketed vessels were unseaworthy. As a consequence respondents voluntarily agreed to remove the picket lines to enable the vessels to be patronized, receive cargo and rendered seaworthy (O.R. 2, pages 57-58).

The district court in Harris County, Texas, "after consideration and study of the evidence, stipulations of the parties and the briefs filed", found that respondents' conduct complained of was arguably within the jurisdiction of the NLRB and that for such reason, preempted by the Board (petitioners' Appendix A, page A2). The Texas Court of Civil Appeals affirmed the district court's findings (petitioners' Appendix B) and in accord, found that respondents' activities were peaceful picketing to protest substandard wages and benefits of the foreign seamen contrasted to American seamen, with the consequential adverse affect of such foreign wages and benefits upon American seamen and their job opportunities here in the United States, with a concurrent request to the public not

to patronize the foreign ships (petitioners' Appendix B, pages B7, 8, 12, 13). The appellate court concluded, such respondents conduct which "* * * but voices a complaint as to foreign wages and urges the public not to patronize foreign vessels * * * * * is peaceful picketing publicizing a labor dispute * * *", and upon decisional law, its validity is suggested. However, the court went on to hold, "(I)t is at least arguably a protected activity under section 7 of the LMRA", finally concluding, preempted by the NLRB and therefore the trial court properly dismissed petitioners' action (petitioners' Appendix B, p. B13). The Supreme Court of Texas found "no error requiring reversal of the judgment of the Court of Civil Appeals" (petitioners' Appendix D).[5]

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[5] Uninterruptedly, petitioners from court to court have proferred, premised upon partial testimony, that a finding be made that the Committee's picketing purpose was to compel the foreign flag petitioners to increase their foreign seaman wages and assumedly, to then argue, it is over the employer-employee relationship aboard the foreign vessels which the NLRB lacks jurisdiction to determine, ergo, no preemption. (See O.R. 1, Transcript petitioners post trial brief before the Trial Court, pages 6-8, 11, 16, 17; O.R. 3, petitioners' brief before Court of Civil Appeals, pages 11, 12, 20; O.R. 10, petitioners' supplemental brief for rehearing Court of Civil Appeals, page 8; O.R. 12, petitioners' application to Supreme Court of Texas for writ of error, pages 6, 7, 17.) Rebuffed in each of these four attempts, petitioners nevertheless, now request this ultimate Court to make such findings, indeed a most unusual procedure. Petitioners' manifest error is demonstrated by examination of all the testimony including the cited witnesses' testimony that his expressions are his own personal feeling and opinion, not the respondents and certainly not the picketing purpose of respondents picketing (O.R. 2B, pages 192-195). Similar thereto is the illustration of reply to a hypothetical question as to "accomplishing educational goals", by payment of equal wages and benefits both foreign and American, and whether such would result in cessation of the picketing activities. Obviously, if that occurred, the picketing would have to cease, it would then be untruthful and unlawful (O.R. 2B, page 158).

ARGUMENT

I.

The National Labor Relations Act preempts state jurisdiction to enjoin peaceful picketing of a foreign flag vessel in the United States by American seamen protestng the substandard wages and benefits paid and provided as contrasted to American seamen, and the adverse affect such substandard conditions have on American seamen and their employment opportunities here in the United States, concurrently requesting the public not to patronize such vessel.

A. Peaceful lawful protest picketing is a protected activity

Peaceful protest picketing to protest wage rates and benefits below those paid and received by workmen in the area, is a long established and fundamental right of American workers protected and preempted by Section 7 of the Labor Management Relations Act (Act). *Garner* v. *Teamsters, Chauffers & Helpers, Etc.*, 346 U.S. 485, 495-500; *United Steelworkers of America* v. *NLRB*, 376 U.S. 492, 498-499; *International Longshoremen's Local 1416* v. *Ariadne Shipping Company*, 397 U.S. 195, 201-202.

But whether the activity be arguably protected or prohibited, state injunctive jurisdiction is clearly preempted. *Garner, supra, Ariadne, supra; San Diego Building Trades Council* v. *Garmon*, 359 U.S. 326; *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138. And preemption applies whether or not there is a proximate employer—employee relationship, *Hotel Employees Union* v. *Sax Enterprises*, 358 U.S. 270; *Retail Clerks Local 560* v. *F. J. Newberry Co.*, 352 U.S. 987; *Pocatello Building & Construction Trades Council* v. *C. H. Elle Cont. Co.*, 352 U.S. 884.

Respondents members unquestioned were and are sustaining the grossest injury to their livelihood and job

opportunities here in the United States. Unquestionably a major cause thereof, was and is the substandard wages and benefits paid and provided foreign seamen aboard foreign flag vessels contrasted to American seamen, with such foreign vessels devouring up to 95% of American sea borne commerce. And it was these substandard wages and conditions which, with increasing continuity, had been permeating the American seamen job market here in the United States, with dire consequences on the employment opportunities and standards of American seamen taking place in their homeland. It was this frightening state of affairs that they were protesting and publicizing and concurrently, asking their fellow citizens help by not patronizing such foreign vessels.

As this Court stated in *Benz* v. *Campania Naviera Hidalgo S.A.*, 353 U.S. 138, 144, and in *McCulloch* v. *Sociedad Nacional Etc.*, 372 U.S. 10, 20, a prime purpose of the Act was to create "a bill of rights * * * for American workingmen" and that "the American workingman ha(d) been deprived of his dignity as an individual", and that "it is the purpose of the (Act) to correct such inadequacies".

The Act's Section 7 is clearly one of the vehicles created for the American worker to correct past inadequacies and to assure his dignity as an individual. And exercising a therein provided right, as American seamen by their protest at bar have undertaken, here in their homeland, constitutes their implementation of the protected right, and at the very least, an arguably protected right, *Garner* and *Garmon*, *supra*,[6] and as to which activity, state court jurisdiction to enjoin, is preempted by the Act.

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[6] It must be noted that at bar, one of the petitioners invoked the Act's NLRB's jurisdiction by the filing of unfair labor practice charges with the NLRB against the respondents. Such charge, by its processing would have ultimately determined the character of the respondents' conduct, protected or prohibited, but most significant, also determine any issue as to the Board's jurisdiction over the con-

We submit, that the unanimous opinions, judgments and orders of the three Texas courts below, based upon the facts as found after trial upon the merits, that Texas courts are without jurisdiction, by virtue of respondents exercise of protected or arguably protected rights under the Act with the determination of the latter, preempted by the NLRB. Such conclusion is fully in accord with prevailing law as enunciated by this Court.

B. NLRB jurisdiction is applicable to the case at hand, notwithstanding the vessels are foreign flags

As found by the courts below, "the basic facts * * * were established by stipulation or uncontraverted evidence", (petitioner's Appendix B pages B2-3). As previously shown, foreign flag vessels now carry 95% of American seaborne commerce. This condition has been brought about substantially by the foreign vessels substandard wages and conditions contrasted to those of American seamen. And, as conclusively demonstrated, such has had dire affect upon American seamen and their employment opportunities here in the United States. To preserve their remaining job opportunities here in the United States, respondents members engaged in protest picketing, publicizing the foregoing facts and requesting the American public not to patronize such foreign vessels.[7] As additionally found, there is no dispute between the petitioners and their employees alien crewmen. The respondents neither have nor claim the right to represent the foreign crews, nor seek

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troversy, *infra*. The vehicle for resolution was available and actually invoked, notwithstanding the same, said petitioner voluntarily withdrew such charge precluding any such determination.

[7] As shown, *supra*, respondents also distributed literature publicizing the dispute, in other communities, cities and areas and arranged for other media communications of the issues.

such right, nor do they seek to support the foreign crewmen in any disagreement they have or may have with the petitioners. Additionally, none of the alien crew are members of respondents' unions and the latters protest picketing has been peaceful, limited in numbers to four pickets and without violence or threat thereof (petitioner's Appendix B, pages B1, 2). The pickets carrying the aforesaid picket signs spoke to no one and handed out literature containing details of their protest. Longshoremen and others, American employees of American employers, refused to cross the picket lines and work upon petitioners' two vessels (petitioner's Appendix B, pages 2 and 3).

Petitioners contend, that because the protest picketing relates to the alleged substandard wages and working conditions of its foreign seamen crews, as contrasted to American seamen, while the vessels are here in United States ports, such picketing directly interferes with such vessels internal affairs, ergo, under applicable law, the NLRB possesses no jurisdiction and state courts are empowered to issue restraints. As found by the courts below, and further demonstrated hereafter, petitioners are in error.

Our starting point are this Court's holding in *Wildenhus' Case,* 120 U.S. 1, and *Cunard S.S. Co.* v. *Mellon,* 262 U.S. 124, that when a foreign vessel enters territorial limits of our nation, our jurisdiction and laws attach. Notwithstanding the same, we may exert only limited jurisdiction or none at all, *Cunard supra.*

Petitioners contend that the Act as interpreted and applied by this Court utilizing the *Cunard* doctrine *supra,* does not apply, for as they maintain, *supra,* the respondents conduct directly affects the internal affairs of their ships and their foreign crews. Reliance is placed upon *Benz* and *McCulloch, supra,* and *Incres Steamship Co.* v. *International Maritime W.U.,* 372 U.S. 24. Analysis of such decisions and others, reveals petitioners' error.

Benz involved a foreign vessel whose alien crew members engaged in a dispute with their employer while the vessel was in a United States port, and such foreign crew struck and picketed the vessel. The foreign seamen then designated an American union as their collective bargaining representative which then picketed the foreign vessel in support of the foreign crew members. Resisting injunction application, the American union *inter alia*, maintained it was engaged in activities protected by the Act. This court concluded, "* * * that Congress did not fashion (the Act) to resolve labor disputes between nationals of other countries operating ships under foreign laws", (*ibid.* 143). *Benz* manifestly is a factual situation wholly dissimilar to the case at bar and patently inapposite. However, as referred to in our previous discussion of *Benz, supra*, relative to purposes of the Act, this Court went on to pointedly emphasize, that within "the boundaries of the Act" are the "workingmen of our country and its possessions" (*ibid.* 144). And we submit at bar, it is such American workingmen, the American seamen who are within the boundaries of the Act, who are exercising rights therein provided not in support of foreign seamen such as in *Benz*, but in their own behalf and not as employees of any foreign vessel.

In *McCulloch*, an American union petitioned the NLRB for certification as the collective bargaining representative of alien crewmen employed aboard a foreign vessel whose foreign crewmen were already covered by a collective agreement between the foreign vessel's owner and a Honduran union. Once again, the facts are wholly dissimilar to the case at bar. In *Incres* again a foreign vessel with a foreign crew, an American union picketed the foreign vessel as part of its campaign to organize and represent the foreign seamen. Again, facts wholly dissimilar to the case at bar.

This Court in its *McCulloch* decision, made applicable to the *Incres* case on the basic issue (*ibid.* 25), relied upon its *Benz* holding, that the Act was applicable to "only the workingmen of our country", (*id.* 18). In *Incres*, this Court specifically noted that the sole issue before it both in *Incres* and *McCulloch* was the Act's application to disputes between *foreign ships and their foreign crews*, concluding that the Act was inapplicable to such disputes. *Incres*, however, points out that notwithstanding the Act's inapplicability to some entities concerning disputes *directly* involving such entities employer-employee relationship, the Act by some of its other provisions, is applicable to, and its provisions properly utilized by such very entities as to certain conduct of American unions, and the latters members. Citing its decision in *Local Union No. 25 of International Brotherhood of Teamsters* v. *N.Y. N.H. & H.R. Co.*, 350 U.S. 155 (1956), this Court made clear, that the Act's sections 303(a) and (b) (damage actions for illegal secondary boycotts), were applicable to entities whose employer-employee relations were nevertheless outside of the Act's scope, a railroad employer there, and as in *Incres*, the foreign vessel owner. The *Incres* court emphasized the above dichotomy as to the Act's application, depending upon the conduct involved, concluding that as to damages sustained for illegal secondary boycott, the Act's federal created right to recover therefor, is applicable, but as to conduct where the Act's NLRB could or would determine the representative for the foreign seamen, mandating the foreign owner to bargain with such representative, with concomitant rights and remedies provided by the Act, such provisions of the Act were inapplicable. The *Incres* court, in implementing the foregoing dichotomy to the conduct before them, held the Act to be inapplicable to such conduct because the, "* * * activities are *directly* related to *Incres* employer-employee relationship, since the very purpose of those activities was the organization of alien seamen on Incres vessels", (*ibid.* 28, emphasis supplied).

Most significant at bar, there is no such conduct as in *Incres*, which is actively seeking representation of the foreign crew and it is such conduct which constitutes the *direct* relationship to employer-employee relations.

Parallel to the Act's aforesaid Section 303(a) and (b), is the 1959 amendment of the Act's Section 8(b)(4)(B) (petitioners' Appendix F, pages F6-8). As so amended, the NLRB has exclusive jurisdiction to determine whether at bar, the picketing induced or encouraged the American longshoremen employed by American stevedoring companies who are admittedly engaged in commerce, not to work upon the picketed vessels, so as to cause such stevedoring companies to cease doing business with the foreign flag vessels, the latter being said statutes, "any or any other person", identical with the application of the provisions of Section 303(a) and (b) aforesaid, and which federal right and remedy is available in the United States to anyone, foreign or citizen. And it is exclusively within the NLRB's province to determine whether the aforesaid conduct constitutes prohibited conduct of American workingmen here in the United State or lawful conduct under such Section's provisos or decisional law. Most noteworthy is the fact that at bar the NLRB's aforesaid jurisdiction was invoked by one of the petitioners. The exclusive province of the Board to the facts in this dispute was fully recognized—a dispute not as in *Benz, McCulloch* and *Incres*, seeking recognition for and representation of the foreign crews to which the Act's provisions are inapplicable, but on the contrary, American workers activities here in the United States, eschewing such representation status, but instead the above described protest picketing, with requests to the public not to patronize the vessels. As to such conduct and activities, the NLRB's preemptive authority is applicable in the administration of Section

8(b)(4)(B).[8] Apparently, petitioners belatedly recognized the significance of the foregoing, triggering their voluntary withdrawal of said unfair labor practice charge.

In *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365, as the Texas court below illustrated, this Court drew an important distinction between the facts there present and those in *Benz. Marine Cooks* is conduct identical with that at bar. As stated by the court below this Court;

> "viewed the union members interest there as being 'in preserving job opportunities for themselves in this country,' not in the 'internal economy' of the foreign vessel. They were picketing on their own behalf and not for the benefit of foreign employees", (petition Appendix B, pages B9-10).

As further stated by this court in *Marine Cooks;*

> "Though the employer here was foreign, the dispute was domestic" (*ibid.* 371, 372).

And such conclusion, its precise language we submit, is equally applicable at bar. Respondents' dispute is here. Their members substantial loss of employment opportunities is in the United States. They do not support or seek representation rights of or for the foreign crews, as in *Benz* and *Incres,* let alone utilization of the Act's provisions thereof as in *McCulloch.* Their activities, in sharp contrast to *Benz, Incres* and *McCulloch* are *not directly related* to the foreign flag vessels employer-employee relations. To the contrary, respondents protest picketing activities is the antithesis of seeking representation rights

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[8] As previously set forth, further premepted is the exercise of Section 7 rights by the picketing American seamen, protesting their loss of job opportunities aboard American ships here in the United States, and seeking to preserve those remaining, a condition brought about by the substandard wages and benefits paid and provided aboard foreign vessels transporting American sea borne commerce, contrasted to wages and benefits paid and provided American seamen.

for the foreign seamen or support thereof. Respondents are requesting that the foreign vessels and their crews be economically ostracized—don't patronize—help American seamen maintain their job opportunities here in the United States.

Further, as stated by the court below, this Court's decision in *Ariadne, supra,* supports the conclusion that the respondents peaceful primary protest picketing, is protected or arguably protected activity under the Act's Section 7 and not activity outside the Act's scope. This Court, in *Ariadne,* expressed the purport of its *Benz, McCulloch* and *Incres* holdings, to wit, that "disputes between foreign ships and their foreign crews", are not within the Act's coverage (*ibid.* 198, 199). Such are the disputes which involve "internal affairs" and "internal order and discipline of the foreign flag vessels". At bar there is no such dispute. As held by the court below:

> "The picketing in the *Ariadne* case could not have been any less destructive to the cargo-carrying business of the ships than the protracted picketing and conflict in *Benz.* So, it seems that the terms "internal affairs" and "internal order and discipline" must refer to the relationship between crew and employer and not to the carrying-on of the business for which the vessel is employed (a matter between shipowner and shipper)." (petition Appendix B, page B11).

It is paramount to note, as distinguished from the facts in *Ariadne,* where the involved longshore work in dispute was performed in part by the foreign crew,* but notwithstanding the same, this court found the Act applicable, at bar, none of the respondent unions members are employed

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* With respect to such fact, this Court in *Ariadne, supra,* put to one side, the effect if any, if such work is carried out entirely by a ship's foreign crew, pursuant to foreign ship's articles (*ibid.,* 199 fn 4). Such possible analagous fact however, is not present at bar.

by the foreign vessel or seek such employment. As the court below pointed out:

> "The protest (respondents) is not directed to allegedly substandard wages paid by foreign shipowners to then-employed American seamen, but to allegedly substandard wages paid to foreign seamen, with a concurrent request to the public not to patronize the foreign ships. There is no direct interference with the relationship between employer and crewmen. Any direct interference is between the consignee and the shipowner, or the shipowner and stevedore company. The fact that appellees are seamen and not merely longshoremen cannot indicate greater involvement in the internal affairs of the ships because none are employed on those ships, (petition Appendix B, pages B12-13).

Nor do the consequences of respondents' lawful primary protest picketing, calling to the American public's attention the facts of the American seamen's loss of job opportunities here in the United States, and the substantial cause thereof, concurrently requesting their help not to patronize the picketed foreign flag vessels, convert such successful activity into conduct of direct interference with the foreign flag vessels employer-employee internal affairs; *NLRB* v. *Fruit and Vegetable Packers Local 760,* 377 U.S. 72; cf. *Local 761 International Union of Electrical Etc.* v. *NLRB,* 366 U.S. 667, 673. Nor does the fact that protest picketing activities occurred at the site of the vessel, constitute direct interference with the foreign flag vessels employer-employee internal affairs, *Schneider* v. *State,* 308 U.S. 147; *Amalgamated Food Employees* v. *Logan Valley Plaza,* 391 U.S. 308.

As found by the court below, the respondents' picketing did not, "intervene(s) in an alien crewmen's strike or strive(s) to organize (petitioners) crewmen"—activity outside of NLRB's jurisdiction, to the contrary, such picketing, "but voice(d) a complaint as to foreign wages and urge(d) the public not to patronize (the) foreign vessels

(picketed)", (*id.* B13)—activity which is within the Board's exclusive jurisdiction, actually or arguably protected under the Act's Section 7, or prohibited or lawful under Section 8(b)(4)(B).

C. Respondents' activities are identical with long established and judicially approved conduct of lawfully requesting the public not to patronize foreign goods and services, in order to preserve domestic employment

It is gainsaid that historic and fundamental to our society is the right of American workers to lawfully picket and protest in the United States, the sale and furnishing of foreign made goods and services in our nation and to request the public's forebearance of such goods and services so as to preserve, maintain and at times, increase employment opportunities for residents of our country. Such is fundamentally the situation at bar.

Petitioners, manifestly to avoid the normal application of such long accepted rule to the events at bar, including the application thereto, of relevant domestic laws, e.g., the Act, and its exclusivity provisions, proffers that the respondents aforementioned "do not patronize" activities, because they involve foreign flag vessels, *ipsi dixit,* renders inapplicable the Act's provisions, and as petitioners pleaded in the state court below, constitutes tortious conduct remedial by state court restraint and damage award.

Petitioners in their aforesaid endeavor, contend that by spot-lighting the most substantial disparity between the wages and benefits existing between their foreign flag crews and American seamen, and concurrently successfully requesting that American residents not patronize the vessel, respondents by such activities are interfering with the internal affairs of their vessels, ergo, under this Court's *Benz, McCulloch* and *Incres* holdings, the Act and its preemptive provisions set forth in our Paragraphs A and B above, are inapplicable. The mere reading of such contention readily illustrates its error.

Petitioners' initial error is their failure to equate the term "internal affairs", with the vessel's "employer-employee relationship". In the authorities aforesaid cited by petitioners, this Court made precise, that it was the Act's application directly to the foreign flag vessels "employer-employee relationship" which was found inappropriate, as witness in such cases the union's conduct and activities to organize the foreign flag employees, represent them as their bargaining representative, seek NLRB election process for such purposes or support such foreign crews controversy with their foreign vessel employer. It is such employer-employee relationship, which is the vessel's internal affairs, further witness *Incres* specific language, "directly related to Incres employer-employee relationship". No such activities, "directly related to petitioner's employer-employee relationship", its internal affairs, is present here.

The conduct at bar is identical with frequent lawful protest picketing conduct in the United States, requesting persons not to patronize foreign made articles so as to preserve employment opportunities here in the United States. Surely such conduct is not "directly related to the employer-employee relationship", of the foreign manufacturer's plant in the foreign nation, so as to vitiate the exercise of American workers rights in the United States, provided for in the Act's Section 7. And the fact that the foreign manufacturer's plant, here the foreign vessel, momentarily comes within our territory, certainly does not automatically remove or vitiate the exercise here in the United States of this federally created right of the American worker, and /or remove with it, the exclusivity component thereof, which precludes state courts from jurisdiction of the dispute. We most respectfully submit, merely to pose the issue renders the reply automatic, to wit, the Section 7 right with its preemptive component remains fully intact.

D. Present is no issue which warrants this Court's review

We respectfully submit that our aforesaid argument demonstrates the absence of issue for this Court's review. The decision and opinion below, comprehensibly sets forth the applicable law and further demonstrates no warrant for review. The court below, in dismissing petitioners' cause of action, found unnecessary to pass upon other defenses asserted by respondents.[10]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: February 28th, 1973

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[10] One of such asserted defenses was that the activities sought to be enjoined were protected by the constitutional guarantees of free speech (petition, Appendix B, p. B4). Such defense is identical to that raised by the petitioner in *Ariadne, supra,* but which this Court noted, that by reason of the conclusion reached there, it made unnecessary consideration of such further contention (*ibid.* 202).

No. 72-1061

In the Supreme Court of the United States

OCTOBER TERM, 1972

WINDWARD SHIPPING (LONDON) LIMITED, ET AL.,
PETITIONERS,

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FOURTEENTH SUPREME JUDICAL DISTRICT OF TEXAS

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

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MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

This memorandum is filed in response to the Court's order of March 26, 1973, inviting the Solicitor General to express the views of the United States in this case.

STATEMENT

The vessels *Northwind* and *Theomana* are ships of Liberian registry, which carry cargo between United States and foreign ports. The crews and officers of the vessels are foreign nationals. (Pet. App. B1-B2.) The wages and other terms and conditions of employment of the crew are covered by contracts with the Pan Hellenic Seamen's Federation, the Indonesia Seafarers, and the Sierra Leone Seamen's Union (Pet. 5).

In October 1971, while both vessels were docked at the Port of Houston, Texas, for the purpose of loading and unloading cargo, six American maritime unions, acting in concert, established picket lines in front of the vessels. There were four pickets at each vessel, carrying signs which read (Pet. App. B2):

ATTENTION TO THE PUBLIC
THE WAGES AND BENEFITS PAID SEAMEN
ABOARD THE VESSEL THEOMANA [NORTHWIND]
ARE SUBSTANDARD TO THOSE OF AMERICAN SEAMEN.
THIS RESULTS IN EXTREME DAMAGE TO OUR WAGE
STANDARDS AND LOSS OF OUR JOBS.
PLEASE DO NOT PATRONIZE THIS VESSEL.
HELP THE AMERICAN SEAMEN.
WE HAVE NO DISPUTE WITH ANY OTHER VESSEL
ON THIS SITE.

[Printed names of the six unions]

The pickets did not speak to anyone. When inquiry was made of them, they handed out literature which read (Pet. App. B2-B3):

TO THE PUBLIC

American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

A strong American Merchant Marine is essential to our national defense. The fewer

American flag ships there are, the weaker our position will be in a period of national emergency.

PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.

Our dispute here is limited to the vessel picketed at this site, the SS [name of vessel added].

There was no labor dispute between the owners of the vessels and their crews or the foreign unions representing them while the picketing took place. The picketing unions neither claimed, nor sought, the right, to represent the foreign crewmen, and none of the crewmen was a member of these unions. The picketing was wholly peaceful. (Pet. App. B2.) As a result of the picketing, longshoremen and other workmen refused to service the vessels (Pet. App. B3).

The owner of the *Theomana* filed a charge with the Regional Office of the National Labor Relations Board in Houston, alleging that the unions had engaged in secondary picketing in violation of Section 8(b)(4)(B) of the National Labor Relations Act, as amended, 29 U.S.C. 158(b)(4)(B); the charge was subsequently withdrawn (Pet. 10, n. 3). The owners of both vessels brought the present suit in a Texas state court, seeking an injunction against the picketing on the ground that it was for the purpose of inducing the owners to break their contracts with their crews and the foreign unions representing them and thus was tortious under Texas law (Pet. App. B3-B4). The trial court dismissed the

suit on the ground that "the issues raised * * * are arguably within the jurisdiction of the National Labor Relations Board and that for such reason are pre-empted by the Board and this Court is without jurisdiction to proceed further" (Pet. App. A2).

The Court of Civil Appeals for the Fourteenth Judicial District of Texas affirmed. The court found that the unions' picketing was a protest directed to "allegedly substandard wages paid to foreign seamen, with a concurrent request to the public not to patronize the foreign ships" (Pet. App. B12-B13). The court further found that, as with the similar union activity in *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365, the unions' basic interest was "'in preserving job opportunities for [their members] in this country,'" and not in regulating "the 'internal economy' of the foreign vessel" (Pet. App. B9). Accordingly, the court concluded that *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, and *Incres Steamship Company* v. *Int'l Maritime Workers Union*, 372 U.S. 24 (discussed, *infra*, pp. 6-8), were inapposite, since in those cases the American unions were seeking to interfere with "the internal order, discipline and affairs of a foreign ship" (Pet. App. B12).

The Court of Civil Appeals, applying the preemption principles of *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, held that the picketing here was, "at least arguably, a protected activity under section 7 of the [NLRA]. As such, it is an activity as to which the exclusive jurisdiction to determine its propriety has been preempted to the NLRB." (Pet. App. B13.)[1]

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[1]The court found that, since the picketing complied with the Board's *Moore Dry Dock* standards, 92 NLRB 547, it was not secondary activity proscribed by Section 8(b)(4)(B) of the National Labor Relations Act (Pet. App. B5-B6).

The Supreme Court of Texas denied the shipowners' application for a writ of error, finding "no error requiring reversal of the judgment of the Court of Civil Appeals" (Pet. App. D1).[2]

DISCUSSION

1. This Court has held that the jurisdiction of the National Labor Relations Board is exclusive and preemptive as to activities which are "arguably" protected under Section 7, or "arguably" prohibited under Section 8, of the National Labor Relations Act. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245; *Int'l Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 200; *Amalgamated Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 284, 293. The state court here found that the unions picketed the foreign flag ships, not to organize or to represent their foreign crewmen, but merely to inform the public that those crewmen were being paid substandard wages which were jeopardizing the work opportunities of American seamen. If the substandard wages protested by the unions had been paid by an American flag ship to its crewmen, or by a foreign flag ship to American

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[2]Two federal district courts, in cases removed from state courts, have also held that similar picketing in other ports, arising out of the same campaign by the unions against foreign flag ships, is preempted by the National Labor Relations Act. *Mountain Navigation Co.* v. *Seafarers' Int'l Union*, 348 F. Supp. 1298 (W.D. Wis.); *Manners Navigation Co.* v. *Seafarers*, 82 LRRM 2433 (D. Minn.), decided June 8, 1972. In addition, the United States Court of Appeals for the Fifth Circuit has affirmed the dismissal of a federal district court suit brought by the Houston Port Authority to enjoin the picketing in that port, on the ground that the Norris-LaGuardia Act, 29 U.S.C. 101-115, precluded such relief. *Port of Houston Authority* v. *Int'l Organization of Masters, Mates, and Pilots*, 456 F. 2d 50, certiorari denied, 409 U.S. 894.

workers hired to load or unload the ship, such "area standards" picketing would be arguably protected by Section 7 of, and thus preempted by, the National Labor Relations Act. See *Houston Bldg. & Const. Trades Council (Claude Everett Const. Co.),* 136 NLRB 321; *Int'l Longshoremen's Local 1416* v. *Ariadne Shipping Co.,* 397 U.S. 195. The basic question here is whether a different conclusion is required because the substandard wages protested are paid by a foreign flag ship to foreign nationals who are working under contracts negotiated with foreign unions.[3] The answer to this question turns upon an analysis of the following decisions.

2. In *McCulloch* and *Incres, supra,* this Court held that "maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2(6)" of the National Labor Relations Act. *Incres,* 372 U.S. at 27. The Act was also held to be

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[3]In *Sailors Union of the Pacific (Moore Dry Dock Co.),* 92 NLRB 547, the Board held that picketing of the primary employer at a location—such as a dock—where other neutral employers are engaged in business operations is secondary and thus violates Section 8(b)(4)(B) of the Act, unless it meets the following conditions (at 549):

> (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer. * * *

The state court found that the picketing here satisfied the *Moore Dry Dock* criteria (note 1, *supra*). However, the Board, if the issue were presented to it, might find and evaluate the facts differently. To this extent, the picketing, if not protected by Section 7, may be prohibited by Section 8(b)(4)(B) of the Act.

inapplicable to the labor dispute in *Benz, supra.* However, as the Court noted in *Ariadne,* 397 U.S. at 198-199:

> This construction of the statute * * * was addressed to situations in which Board regulation of the labor relations in question would necessitate inquiry into the "internal discipline and order" of a foreign vessel, an intervention thought likely to "raise considerable disturbance not only in the field of maritime law but in our international relations as well." *McCulloch,* 372 U.S., at 19.
>
> In *Benz* a foreign-flag vessel temporarily in an American port was picketed by an American seamen's union, supporting the demands of a foreign crew for more favorable conditions than those in the ship's articles which they signed under foreign law, upon joining the vessel in a foreign port. In *McCulloch* an American seamen's union petitioned for a representation election among the foreign crew members of a Honduran-flag vessel who were already represented by a Honduran union, certified under Honduran labor law. Again, in *Incres* the picketing was by an American union formed "for the primary purpose of organizing foreign seamen on foreign-flag ships." 372 U.S., at 25-26. In these cases, we concluded that, since the Act primarily concerns strife between American employers and employees, we could reasonably expect Congress to have stated expressly any intention to include within its coverage disputes between foreign ships and their foreign crews. * * *

In *Ariadne* itself, on the other hand, the Court held that picketing to protest the wages paid to

American longshoremen who were employed by foreign vessels to handle their cargo was governed by the National Labor Relations Act. The Court reasoned (397 U.S. at 200):

> The American longshoremen's short-term, irregular and casual connection with the respective vessels plainly belied any involvement on their part with the ships' "internal discipline and order." Application of United States law to resolve a dispute over the wages paid the men for their longshore work, accordingly, would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law. * * *[4]

3. The situation here is closer to *Ariadne* than it is to *Benz, McCulloch,* and *Incres.* The unions are not seeking to represent or organize the foreign seamen employed on the foreign flag ships, nor are they seeking to help them in a dispute which they have with their employer. As in *Ariadne,* the unions' only concern is with the employment conditions of American workingmen, *i.e.,* they desire to protect the wages of American seamen from being eroded as a result of the lower wage rates allegedly paid by the foreign vessels. They have not sought to negotiate a contract with the foreign shipowners which would raise the wages they are paying to their foreign crews. They have merely appealed to members of the American public not to patronize the foreign vessels, and to American longshoremen and other workers not to service them.

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[4]The Court "put to one side situations in which the longshore work, although involving activities on an American dock, is carried out entirely by a ship's foreign crew, pursuant to foreign ship's articles." *Ariadne,* 397 U.S. at 199, n. 4.

This pressure, if successful, may either drive the foreign vessels out of business or cause them to raise their wage rates and other employee benefits to the American scale—and, in this sense, the picketing would have an impact on the internal economy of the vessel. However, this impact is an incident of seeking to protect a legitimate American interest (*i.e.*, the employment opportunities of American seamen), and not, as in *Benz, McCulloch,* and *Incres,* the result of a direct effort to negotiate for the foreign seamen, or to aid them in a dispute with the foreign shipowners.[5] Under those decisions, it is only the latter type of involvement in the labor relations of a foreign ship—which presents a real danger of conflicts with the law of the flag state—to which the National Labor Relations Act does not apply.

This conclusion is supported by *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365. There the Court, in holding that the Norris-LaGuardia Act precluded a federal court from enjoining "area

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[5]As the unions have stated, their "protest picketing activities is the antithesis of seeking representation rights for the foreign seamen or support thereof. Respondents are requesting that the foreign vessels and their crews be economically ostracized—don't patronize—help American seamen maintain their job opportunities here in the United States" (Br. in Opp., 17-18). Nor is a different conclusion required by the testimony of union representatives that it was to the unions' interest to get the foreign ship owners to increase the wages and working conditions of their crews, so that the American operators could become more competitive with them (Pet. 19; Transcript, pp. 158, 190). That the unions may have expected or even hoped that this would be a possible result of their picketing, does not establish that they intended to achieve that objective through contract or other direct negotiations with the foreign shipowners. Cf. *Local 761, Int'l Union of Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 673.

standards" picketing of a foreign flag ship, stated (at 371, n. 12):

> Unlike the situation in the *Benz* case, in which American unions to which the foreign seamen did not belong picketed the foreign ship in sympathy with the strike of the foreign seamen aboard, the union members here were not interested in the internal economy of the ship, but rather were interested in preserving job opportunities for themselves in this country. They were picketing on their own behalf, not on behalf of the foreign employees as in *Benz*. Though the employer here was foreign, the dispute was domestic. * * *[6]

CONCLUSION

For these reasons, the court below correctly concluded that the picketing in this case was arguably subject to regulation under the National Labor Relations Act, and that under the preemption principles outlined above (p. 5) the complaint should be dis-

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[6]The Court in *Marine Cooks* was resolving only the issue of whether such picketing arose out of a "labor dispute" under the Norris-LaGuardia Act. As the Court later stated in *McCulloch*, "the application of the Norris-LaGuardia Act 'to curtail and regulate the jurisdiction of courts' differs from the application of the Taft-Hartley Act 'to regulate the conduct of people engaged in labor disputes'" (372 U.S. at 18). However, the fact that the National Labor Relations Act, rather than the Norris-LaGuardia Act, is involved here does not convert a domestic dispute into one which affects the internal economy of a foreign ship.

missed for lack of subject matter jurisdiction. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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MAY 1973

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1061

WINDWARD SHIPPING (LONDON) LIMITED, *et al.*,
Petitioners,

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,
Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS

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Petitioners,

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS

Pursuant to Rule 24(5) of the Rules of the Supreme Court of the United States,* petitioners Windward Shipping (London) Limited, et al., hereby submit a supplemental brief calling to the Court's attention the recent decision of the Supreme Court of Alabama in *American Radio Association, AFL-CIO* v. *Mobile Steamship Association, Inc.*, Ala. , So. 2d , No. SC 12, May 3, 1973.** The decision of the Alabama Supreme

* Rule 24(5) states: "Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing."

** The opinion of the Supreme Court of Alabama, not yet officially reported, is reprinted as an Appendix to this Supplemental Brief. All citations to *American Radio Association, AFL-CIO* v. *Mobile Steamship Association, Inc.* are to the opinion as reprinted in the Appendix.

Court is of significance not only because it is factually similar to the case before this Court, but also because it is the only decision by a state court of last resort which directly involves the question presented in the petition for certiorari.*

In *Mobile Steamship,* plaintiff, the agent of a number of steamship and contract stevedoring companies, brought an action temporarily to restrain picketing by American Radio Association and other maritime unions. As in the case before this Court, the unions picketed foreign registry ships at dockside, carrying signs asking the public not to patronize the foreign ships and distributing leaflets calling attention to the plight of the American seamen. Indeed, the signs and leaflets were identical to those used in picketing petitioners' vessels at the port of Houston. There was no violence or threat of violence [Appendix pp. A2-A4]. As in the case before this Court, the picketing resulted in a refusal of stevedores to cross the picket lines so the ships could not be loaded or unloaded. [Appendix p. A4]. Plaintiffs in *Mobile Steamship* alleged that the picketing was illegal because it interfered with contractual relations between members of plaintiff association and companies owning and operating foreign-flag vessels and wrongfully interfered with the lawful business of the plaintiffs. [Appendix p. A4]. The Mobile Circuit Court, sitting in equity, held a hearing and temporarily enjoined the defendant unions from picketing. [Appendix p. A1]. The Supreme Court of Alabama affirmed. Justice McCall speaking for the court, observed:

> "There was no dispute between the operators of the [foreign vessel] and her foreign crew. But there was a labor dispute between the American unions and the operators of the [foreign vessel]. This was brought about by substandard wages and

* No federal appeals court has decided the question presented in the petition.

> benefits, resulting in loss of jobs by American seamen. The American unions contend that they are seeking relief from this situation. A labor dispute includes any controversy concerning terms, tenure or conditions of employment, regardless of whether the disputants stand in the proximate relation of employee and employer. 29 U. S. C. §152(9)." [Appendix pp. A4-A5].

He then stated the jurisdictional question presented:*

> "The threshold point for determination is, granting there is a labor dispute between the unions and the foreign companies, is it a 'labor dispute' of such nature that the Labor Management Relations Act . . . preempts the jurisdiction of the state courts of Alabama?" [Appendix p. A5].

The court sought an answer to this question by looking into the purposes of the picketing:

> ". . . there is a labor dispute here between the unions and foreign ship companies over terms, tenure and conditions of employment by them of their foreign crews. The picketing of the foreign ship has the effect to both publicize the unions' grievance against substandard wages as well as to bring pressure on the foreign employer to pay its seamen higher wages and provide them additional benefits. This purpose is borne out by the language of the placards and leaflets. The Supreme Court of the United States has refused to apply the provisions of the National Labor Relations Act in instances concerning the internal affairs of foreign ships even when in American ports and arguably

* It should be noted that the issue of preemption of state court jurisdiction is not affected by the nature of the relief sought, *i.e.* temporary or permanent relief.

affecting the American economy." [Appendix pp. A5-A6].

The Court then discussed *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10 (1963) and *Incres Steamship Co.* v. *International Maritime Workers Union*, 372 U. S. 24 (1963) and concluded:

> "Applying the rationale of the above decisions of the Supreme Court of the United States to the facts of the case at hand, we conclude that the Labor Management Relations Act . . . does not apply in this case and did not preempt the state court from entertaining jurisdiction of the cause. The dispute was either one between the unions and the foreign shipowners to force a raise in the internal standards of these vessels, or one where the intent was to block use of those ships to force Congress to act in the international sphere, which in either case are matters affecting international relations and not properly for NLRB jurisdiction." [Appendix p. A9].

Petitioners submit that *Mobile Steamship* states the correct rule of law to be applied in this case and presents cogent reasons in support of their contention that the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas erred in affirming dismissal of petitioners' actions. Petitioners again urge that their petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX TO SUPPLEMENTAL BRIEF

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1972-73

AMERICAN RADIO ASSOCIATION, AFL-CIO, etc., et al.

v. SC 12

MOBILE STEAMSHIP ASSOCIATION, INC., et al.

Appeal from Mobile Circuit Court, In Equity

McCALL, JUSTICE.

The American Radio Association, AFL-CIO, an unincorporated labor organization, and other respondents in this cause, hereafter sometimes called the "Unions," appeal from an order of the circuit court, granting, after notice and a court hearing, a writ of temporary injunction, enjoining and restraining the appellants from picketing.

The appellee Mobile Steamship Association, Inc. is the representative and agent of numerous steamship and contract stevedoring companies who do business at the Port of Mobile. The appellee acts as collective bargaining representative and contract negotiator on behalf of its several principals in their business relations with local unions of the International Longshoremen's Association, who supply the stevedoring services for the loading and discharging of cargo carried by numerous ships calling at the Port of Mobile.

Appendix to Supplemental Brief

The appellee, Robert E. Malone, who was allowed to intervene in the cause, is a farmer in Mobile County. He grows soybeans which are delivered in sale by him at the grain elevator at the Alabama State Docks. Soybeans are exported by ship through the State Docks facility.

Shortly after noon on November 3, 1971, pickets for several of the appellant unions appeared at land entrances to the Alabama State Docks at Mobile, picketing and patrolling with uniform signs reading as follows:

> " 'ATTENTION TO THE PUBLIC
>
> " 'The wages and benefits paid aboard the vessel SS AQUA GLORY and the SS BEL HUDSON are substandard to those of the American seamen. This results in extreme damage to our wage standard and the loss of our jobs.
>
> " 'Please do not patronize these vessels. Help the American seamen.
>
> " 'We have no dispute with other vessels at this site.' "

The names of the picketing unions appeared beneath the quoted matter.

In addition to carrying the picketing signs, the pickets distributed to those persons, who asked if they should cross the picket line, leaflets which read as follows:

> "TO THE PUBLIC
>
> "American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

"American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

"A strong American Merchant Marine is essential to our national defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.

"PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.

"Our dispute here is limited to the vessel picket at this site, the SS ".

The names of the unions again appeared at the bottom of the leaflets.

Two days later the pickets shifted to pier side, where the S.S. Aqua Glory and S.S. Bel Hudson were berthed. Soon afterwards the pickets were withdrawn from the Bel Hudson, a ship of British registry.

The Aqua Glory was a foreign-flag ship of Liberian registry, engaged in carrying cargo in foreign commerce, and manned by a crew of alien seamen. No more than four persons engaged in the picketing along pier side at the gangway to the Aqua Glory. No breach of contract was involved. The picketing was peaceful and without any violence. There was no mass picketing, no trespassing on the property of others, no blocking of ingress or egress, no shouting, no assaults, and no overt acts of force. The pickets, while on duty carried their signs,

but refused to converse with other individuals. They remained silent and only referred inquisitors to their picketing signs and handed them one of the above described leaflets. The appellant unions asserted that they purposed to picket all foreign-flag ships that docked at the port in order to evidence a nationwide protest by American Maritime Workers over the loss of their jobs to foreign-flag vessels which paid wages and benefits substandard in contrast to those paid on American-flag vessels. The appellants insisted that they would attack the problem of the loss of job opportunities for American seamen in the United States to foreign-flag vessels by publicity or informational picketing and the distribution of literature in selected American ports, including the Port of Mobile, requesting the public not to patronize foreign-flag vessels which were picketed, but to patronize American-flag vessels, pointing out to the public that wages and benefits paid to foreign-flag seamen were vastly inferior to those paid American seamen.

Posting the pickets, as was done on the dock adjacent to the Aqua Glory, brought about an immediate refusal by the stevedore workers of the locals of International Longshoremen's Association to cross the picket line of the appellant unions. About eighty percent of the cargo ships that enter the Port of Mobile, sail under a foreign-flag and are manned by alien crews.

The appellees complained that the picketing was illegal because it interfered with contractual relations between members of the appellee association and companies owning and operating foreign-flag vessels, and, wrongfully interfered with lawful business of the appellees.

There was no dispute between the operators of the Aqua Glory and her foreign crew. But there was a labor

dispute between the American unions and the operators of the Aqua Glory. This was brought about by substandard wages and benefits, resulting in loss of jobs by American seamen. The American unions contend that they are seeking relief from this situation. A labor dispute includes any controversy concerning terms, tenure or conditions of employment, regardless of whether the disputants stand in the proximate relation of employee and employer. 29 U. S. C., §152(9).

The threshold point for determination is, granting there is a labor dispute between the unions and the foreign companies, is it a "labor dispute" of such nature that the Labor Management Relations Act, 29 U. S. C., §141 et seq., preempts the jurisdiction of the state courts of Alabama?

The appellants contend that the jurisdiction of the state court is preempted by the Labor Management Relations Act, 29 U. S. C., §141 et seq. and that exclusive jurisdiction of the case is reserved to the National Labor Relations Board. In opposition the appellees assert that the jurisdictional provisions of the National Labor Relations Act, 29 U. S. C., §151 et seq. as amended by the Labor Management Relations Act, 1947, 29 U. S. C. 141 et seq. do not extend to maritime operations of foreign-flag ships employing alien seamen. 48 Am. Jur. 2d, §405, p. 296. If the appellees' insistence be a correct statement of law, then, under the facts in this case, the state court did not lack jurisdiction to entertain this suit in equity as urged by the appellants.

As already pointed out, there is a labor dispute here between the unions and foreign ship companies over terms, tenure and conditions of employment by them of their foreign crews. The picketing of the foreign ship has

the effect to both publicize the unions' grievance against substandard wages as well as to bring pressure on the foreign employer to pay its seamen higher wages and provide them additional benefits. This purpose is borne out by the language of the placards and leaflets. The Supreme Court of the United States has refused to apply the provisions of the National Labor Relations Act in instances concerning the internal affairs of foreign ships even when in American ports and arguably affecting the American economy. Congress has not clearly extended NLRB jurisdiction to such matters and the court has been unwilling to find board jurisdiction in an area where international relations are involved. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10, 9 L. Ed. 2d 547, 83 S. Ct. 671 (1963).

In *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* supra, United Fruit Company, a New Jersey corporation, owned all of the stock of Empresa Hondurena de Vapores, S.A., a Honduran corporation, which legally owned each of the vessels, sought to be unionized. Each vessel flew a foreign flag, carried a foreign crew and had other contacts with the nation of its flag. The National Labor Relations Board ordered an election in a representation proceeding on application of the National Maritime Union, which had the effect of canceling the bargaining contract that Empresa's seamen had with their Honduran Union, Sociedad. Sociedad brought one of the suits involved on appeal to prevent the election.

The court said that the basic question was whether the NLRA as written was intended to have any application to foreign registered vessels employing only alien seamen. After noting that the Congress and the State Department had recognized the right of foreign ships to conduct their own internal affairs, the court concluded,

citing *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138 at 147, 1 L. Ed. 2d 709, 77 S. Ct. 699, that "to sanction the exercise of local sovereignty under such conditions in this 'delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.' "

Explaining further its rationale, the court at p. 18 in *McCulloch,* supra, said:

> "Six years ago this Court considered the question of the Taft-Hartley amendments to the Act in a suit for damages 'resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel [was] temporarily in an American port.' Benz v. Compania Naviera Hidalgo, supra, at 139. We held that the Act did not apply, searching the language and the legislative history and concluding that the latter 'inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions.' Id., at 144. Subsequently, in Marine Cooks & Stewards v. Panama S.S. Co., 362 U. S. 365 (1960), we held that the Norris LaGuardia Act, 29 U. S. C. §101, deprived a Federal District Court of jurisdiction to enjoin picketing of a foreign-flag ship, specifically limiting the holding to the jurisdiction of the court 'to issue the injunction it did under the circumstances shown.' Id., at 372. That case cannot be regarded as limiting the earlier Benz holding, however, since no question as to 'whether the picketing . . . was tortious under state or federal law' was either presented or decided. Ibid. Indeed, the Court specifically noted that the application of the Norris-

LaGuardia Act 'to curtail and regulate the jurisdiction of courts' differs from the application of the Taft-Hartley Act 'to regulate the conduct of people engaged in labor disputes.' Ibid.; see Comment, 69 Yale L. J. 498, 523-525 (1960)."

Again in *Incres Steamship Company* v. *International Maritime Workers Union,* 372 U. S. 24, 9 L. Ed. 2d 557, 83 S. Ct. 611 (1963), the facts involved an American seamen's union picketing a foreign owned vessel, manned by a foreign crew, in a campaign to organize the crew. The court held that the NLRB was without jurisdiction, saying:

"We held today in Sociedad Nacional that the Act does not apply to foreign-registered ships employing alien seamen. The holding and reasoning in that case are equally applicable to the maritime operations here, leading to the conclusion that the Act does not apply. It is true that our decision in Garmon [359 U. S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959)], supra, as applied in Marine Engineers Beneficial Assn. v. Interlake S.S. Co., 370 U. S. 173 (1962), results in pre-emption of state court jurisdiction if a dispute is arguably within the jurisdiction of the Board. But, although it was arguable that the Board's jurisdiction extended to this dispute at the time of the New York Court of Appeals' decision, our decision in Sociedad Nacional clearly negates such jurisdiction now. In that case we were immediately concerned with the Board's jurisdiction to direct an election, holding that the Act had no application to the operations of foreign-flag ships employing alien crews. Therefore, no different result as to Board jurisdiction follows

> from the fact that our immediate concern here is the picketing of a foreign-flag ship by an American union. See Benz v. Compania Naviera Hidalgo, 353 U. S. 138 (1957). The Board's jurisdiction to prevent unfair labor practices, like its jurisdiction to direct elections, is based upon circumstances 'affecting commerce,' and we have concluded that maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of §2(6), 29 U. S. C. §152(6)."

Applying the rationale of the above decisions of the Supreme Court of the United States to the facts of the case at hand, we conclude that the Labor Management Relations Act of 1947 does not apply in this case and did not preempt the state court from entertaining jurisdiction of the cause. The dispute was either one between the unions and the foreign shipowners to force a raise in the internal standards of those vessels, or one where the intent was to block use of those ships to force Congress to act in the international sphere, which in either case are matters affecting international relations and not properly for NLRB jurisdiction.

We disagree with the appellants' contention that the state court may not grant injunctive relief because the Norris-LaGuardia Act, 29 U. S. C., §§101, et seq., prohibits the issuance of any restraining order or temporary or permanent injunction by a state court in a peaceful labor dispute.

The Norris-LaGuardia Act, 29 U. S. C., §§101, et seq. provides as follows:

> "No court of the United States, as defined in this chapter, shall have jurisdiction to issue any re-

> straining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter."

29 U. S. C., §113(d) defines the term "court of the United States" as follows:

> "(d) the term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

The anti-injunction provisions of the Norris-LaGuardia Act are not applicable to state courts and hence, do not deprive them of jurisdiction to issue an injunction in a case involving a labor dispute.

In *Ford* v. *Boeger,* 362 F. 2d 999 (1966); certiorari denied sub nom *Curtis* v. *Boeger,* 386 U. S. 914, 17 L. Ed. 2d 787, 87 S. Ct. 857; petition for rehearing denied 386 U. S. 978, 18 L. Ed. 2d 140, 87 S. Ct. 1160; motion for leave to file second petition for rehearing denied 387 U. S. 949, 18 L. Ed. 2d 1341, 87 S. Ct. 2072, the court said:

> "Petitioners' reliance upon the Norris-LaGuardia anti-injunction Act, 29 U. S. C. A. §101 et seq., is misplaced. The Norris-LaGuardia injunction limitations are imposed only upon courts of the United States. The Court of Appeals for the Third Circuit in American Dredging Co. v. Local 25, etc., 3 Cir., 338 F. 2d 837, 850-856, clearly and con-

> vincingly demonstrates why the prohibition applies only to federal courts—not to state courts."

In the cited case of *American Dredging Co.* v. *Local 25, Marine Div., Int'l Union of Operative Eng'rs,* 338 F. 2d 837, 852 (3d Cir. 1964), certiorari denied 380 U. S. 935, 13 L. Ed. 2d 822, 85 S. Ct. 941 (1965), the court stated:

> "There is nothing in the language of the Act or its legislative history which can possibly, within 'the range of judicial inventiveness', or the process of judicial fashioning, be construed as extending to the jurisdiction of state courts."

Among other cases holding without merit the contention that the Norris-LaGuardia Act deprived the court below of jurisdiction to issue the injunction in this labor dispute are the following decisions of state courts: *Shaw Electric Co., Inc.* v. *International Brotherhood Electrical Workers, Local Union 98,* 418 Pa. 1, 208 A. 2d 769 (1965); *South Atlantic and Gulf Coast District, International Longshoremen's Ass'n* v. *Producers Grain Corporation,* 437 S. W. 2d 33 (Tex. Civ. App. 1969).

We are aware that there is considerable difference of thought on the legality of state court injunctions in matters involving labor disputes. To this we can only say that generally where there is a clearly defined labor dispute affecting commerce the NLRB has jurisdiction preemptive of all courts state and federal. But, as here, where the dispute is one where commerce, as covered by the federal act, is not involved, and the resulting effect, albeit non-direct, of the dispute immediately endangers the business activities of a large segment of the area's population, we think that it is neither illegal nor improper

for the court to take jurisdiction and deal temporarily with the subject matter.

The second tier of the dispute on appeal involves the propriety of the issuance of the temporary injunction. Specifically, even though there was no NLRB preemption, was the activity involved protected by the First Amendment as free expression; or was it such unlawful interference with the business of another as will be enjoined under our state laws?

The appellant unions contend that their activity is protected as free speech under the United States Constitution as construed in *Thornhill* v. *Alabama,* 310 U. S. 88, 84 L. Ed. 1093, 60 S. Ct. 736, and its progeny. We are mindful however of the characterization of similar matters as "speech plus," that is, speech with collateral consequences involved that invite regulation, or, as matters excepted from First Amendment protection because of overriding state interest. The First and Fourteenth Amendments do not afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets as those amendments afford to those who communicate by pure speech.

The case of *International Brotherhood of Teamsters* v. *Vogt, Inc.,* 354 U. S. 284, 1 L. Ed. 2d 1347, 77 S. Ct. 1166 (1957) has approached resolving the issue in the labor forum. In *Vogt,* a union, having a dispute with a group of nonunion workers, picketed the employer's place of business. In consequence, truckers of other employers refused to haul to and from Vogt's business. The neutral employer sought and obtained a state court injunction. The court noted the historical development of the theory

that labor picketing is protected free speech, beginning in the *Thornhill* case, supra, and furthered in *AF of L* v. *Swing,* 312 U. S. 321, 85 L. Ed. 855, 61 S. Ct. 568 (1941). After analyzing these decisions, the *Vogt* case, supra, went on to admit that the reach of those opinions had perhaps exceeded practicality, and discussed three subsequent Supreme Court cases which strongly parallel the present dispute. In *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490, 497, 93 L. Ed. 834, 69 S. Ct. 684 (1949), the court said:

> "It is contended that the injunction against picketing adjacent to Empire's place of business is an unconstitutional abridgement of free speech because the picketers were attempting peacefully to publicize truthful facts about a labor dispute. * * * But the record here does not permit this publicizing to be treated in isolation. For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to nonunion peddlers. Thus all of appellants' activities * * * constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. * * *"

In *Hughes* v. *Superior Court of California,* 339 U. S. 460, 94 L. Ed. 985, 70 S. Ct. 718 (1950), and in *International Brotherhood of Teamsters Union* v. *Hanke,* 339 U. S. 470, 94 L. Ed. 975, 70 S. Ct. 773 (1950), state court injunctions against picketing were upheld on a showing that the courts were effecting a valid state interest or

public policy. In *Hughes,* the policy was against racial-quota hiring and in *Hanke* the policy was the avoidance of forced union shop agreements. The court in *Vogt* held that, while states cannot enact blanket prohibitions against picketing, where there are conflicting interests between the picketers and the public policy of a state, the picketing can be enjoined, and allowed the state court injunction against picketing to stand.

In the instant case as will be shown infra, we think there was evidence sufficient to support a finding that the action of the unions was in part with the goal of interfering with the business of the appellees in their shipping and farming operations. The United States Court of Appeals for the First Circuit has recently noted that there is a valid state interest in the preservation of local economy.

In *Grinnell Corp.* v. *Hackett,* 41 U. S. L. W. 2533 (CA 1st Cir., March 15, 1973) which admittedly did not involve a picketing injunction, the court recognized two economic and social effects which are valid interests of the state and may be considered in labor disputes. The first of the two effects, the avoidance of violence in strikes, is not here present, but the second recognized effect of a labor dispute is. The court noted that a state may be validly concerned with the "avoidance of economic stagnation in the local community" caused by strike activity.

We feel the Circuit Court in Mobile County could validly consider the economic effects of the picketing at the particular time the dispute was in progress and issue its order ceasing all picketing until the underlying questions could be resolved without unlawfully interfering with

appellants' rights to express themselves on the disputed issue.

While peaceful picketing, standing alone, is conceded to be lawful and is not to be enjoined, picketing still may be enjoined if it is done in an unlawful manner or for an unlawful purpose. *Local No. 612, International Brotherhood of Teamsters* v. *Bowman Transportation, Inc.*, 276 Ala. 563, 165 So. 2d 113 (1964); *Baggett Transportation Co.* v. *Local No. 261, United Wholesale & Warehouse Employees Union*, 259 Ala. 19, 65 So. 2d 506 (1953); *Hotel & Restaurant Employees, International Alliance* v. *Greenwood*, 249 Ala. 265, 30 So. 2d 696 (1947); *Thornhill* v. *Alabama*, 310 U. S. 88, 84 L. Ed. 1093, 60 S. Ct. 736 (1940). The conduct of picketing, if done in an unlawful manner or for an unlawful purpose, is not beyond the control of a state. *Baggett Transportation Co.* v. *Local No. 261, United Wholesale and Warehouse Employees Union*, supra; *Hughes* v. *Superior Court of California*, 339 U. S. 460, 94 L. Ed. 985, 70 S. Ct. 718 (1950). If the purpose or object for the picketing, or any of the purposes or objects therefor, is interference with the right of a third party to conduct his business, the picketing is wrongful and may be enjoined. *International Brotherhood of Teamsters* v. *Vogt, Inc.*, 354 U. S. 284, 1 L. Ed. 2d 1347, 77 S. Ct. 1166 (1957).

In *Pennington* v. *Birmingham Baseball Club*, 277 Ala. 336, 170 So. 2d 410 (1964), the court said:

> "* * * [T]he right to conduct one's business without the wrongful interference of others is a valuable property right which will be protected if necessary, by injunctive process. Carter v. Knapp Motor Co., 243 Ala. 600, 11 So. 2d 383, 144 A. L. R. 1177."

So the bare question in this case narrows to whether or not there was a purpose or objective on the appellants' part to wrongfully interfere with the appellees' business, or was the picketing to publicize the appellants' cause with mere resulting incidental interference to appellees' business? The trial judge's decree, granting the writ of temporary injunction, made no finding of fact from the evidence. But apparently the trial judge found from the evidence that there was wrongful interference by the appellants with the appellees' business, for otherwise, he would not have ordered the writ of temporary injunction to issue.

The appellants contend that their only purpose was to carry out publicity picketing to inform the public and Congress of the plight of the American seamen. The appellee contends that the picketing was done for the purpose of inducing and encouraging the appellee's employees to cease loading the soybeans aboard foreign ships thereby interfering with the business of its member employers.

We must decide whether the trial judge abused his discretion by concluding that there was wrongful interference with the appellee's business, warranting his issuance of the temporary writ. In this situation some well known equitable principles should be kept in mind. Among these, it is to be remembered that, in determining whether or not a temporary injunction should have issued, wide discretion is accorded the trial judge hearing the application and making the decision, and, where no abuse of that discretion is shown, his action will not be disturbed on appeal. *Slay* v. *Hess,* 252 Ala. 455, 41 So. 2d 582 (1949); *Jones* v. *Jefferson County,* 203 Ala. 137, 82 So. 167 (1919); *Holcomb* v. *Forsyth,* 216 Ala. 486, 113 So. 516 (1927); *Boat-*

wright v. *Town of Leighton,* 231 Ala. 607, 166 So. 418 (1936).

In *Madison Limestone Co.* v. *McDonald,* 264 Ala. 295, 300, 87 So. 2d 539 (1956), we said this:

> "* * * When the bill contains equity, the trial judge, in granting a temporary injunction to preserve the status quo until the final hearing, exercises a wide discretion, taking into consideration the relative advantages and disadvantages resulting from granting or refusing to grant the injunction. Unless that discretion is abused it will not be disturbed on appeal. Slay v. Hess, supra; Loop National Bank v. Cox, [255 Ala. 388, 51 So. 2d 534] supra."

And, a sequel to the theories of balancing conveniences between the parties and the discretionary power of the trial judge to maintain the status quo until the final hearing, is the premise that the issue of who will prevail on final hearing is not concluded on a preliminary hearing to determine whether an injunction pendente lite will issue or not. In *Hamilton* v. *City of Anniston,* 248 Ala. 396, 401, 27 So. 2d 857 (1946), the court said:

> "* * * The right to temporary injunction does not depend on any advance finding for complainant on the merits. Odoms v. Woodall, 246 Ala. 427, 20 So. 2d 849; Berman v. Wreck-A-Pair Bldg. Co., 234 Ala. 293, 175 So. 269. It is not necessary that complainant must present a case which will certainly entitle him to a decree upon a final hearing for he may be entitled to temporary injunction though his right to relief may ultimately fail. If the bill clearly shows a substantial question to be decided, a temporary injunction to preserve the

> status quo is in order. Glass v. Prudential Ins. Co. of America, 246 Ala. 579, 22 So. 2d 13; Coxe v. Huntsville Gaslight Co., 129 Ala. 496, 29 So. 867." See also *East Gadsden Bank* v. *Bagwell,* 273 Ala. 441, 445, 143 So. 2d 438.

We have no reason to assume otherwise than that the trial judge, in the exercise of the wide discretion accorded him in a matter of this kind, gave close heed to the issues involved, and concluded that while a substantial question remained to be decided, the immediate circumstances obliged him to order the temporary writ. Even so, we must consider the record to determine whether the trial judge abused his discretion in granting the temporary injunction. This necessitates our deciding whether or not there was any evidence to support a conclusion that the picketing had as a purpose or object the wrongful interference with the appellee's business.

During the course of the cross-examination of a witness for appellant unions, the following question and answer colloquy occurred:

> "Q. What percentage of the vessels that call here at the Port [of Mobile] are of foreign flags? A. I would say about 70 to 80 percent.
>
> "Q. Yes, sir. And it's your instructions from your International Headquarters to picket 70 or 80 percent of the vessels that call at the Port of Mobile? A. Within my resources, yes, to picket every one.
>
> "Q. All right, sir. And you would assume, as a man knowledgeable in the field of labor picketing that good labor men and good Union men would not cross those picket lines? A. We were hoping that they wouldn't do that.

"Q. Yes, sir. And this hope has been fulfilled in the Port of Mobile as far as longshoremen are concerned, isn't that true? A. Well, to a point, yes.

"Q. *Now, would it not be then a fair conclusion to say that you had hoped and do hope that you will be able to prevent 70 or 80 percent of the vessels in the Port of Mobile from loading or from unloading cargo?* A. *My hope is to clutter up the Port of Mobile with foreign flags—Liberian, Panamanian ships—to bring sufficient pressure on the United States Government to do something about the American merchant marine.*

"Q. *That's your intention?* A. *Yes, sir.*

"Q. *That's your purpose?* A. *Yes, sir.* (Emphasis supplied)

* * *

"Q. All right, sir. But you realize that your picketing is keeping members of the Mobile Steamship Association from loading and unloading these vessels that you are picketing, do you not? A. That is not the purpose of our picket line.

"Q. No, sir, I didn't ask you the purpose. You realize today that your picketing is preventing members of the Association from loading and unloading these vessels that you are picketing? A. *I hope that my picket line will shut the whole State Docks down and let everybody go home for a while. I hope I can do that. Not just the Mobile Steamship Association.*" (Emphasis supplied)

In 51A C. J. S. Labor Relations, §319, p. 135, we find a statement of law that is material in a decision of this matter. It reads as follows:

"*Expectation, hope or desire.* While it has been said that Congress did not intend to proscribe all

> actions accompanied merely by hope that such activity would affect the business relations between the primary and neutral employees, if picketing is conducted by a primary union with an expectation or a hope or a desire that employees of the secondary employer will be induced or encouraged to take concerted action, so that the secondary employer will cease doing business with the primary employer, the act bars such activity."

The Fifth Circuit Court of Appeals stated in *Superior Derrick Corporation* v. *National Labor Relations Board*, 273 F. 2d 891, 897 (5th Cir. 1960):

> "* * * [I]f there is an expectation or a hope or a desire that employees of the secondary employer will be induced or encouraged to take concerted action so that the secondary employer will cease doing business with the primary employer, then the Act bars that activity. * * * The activity, including the picket line, must be conducted in such a way that the normal appeal of a picket line is overcome. It must be done so that all secondary employees will know that the primary union does not seek what the law forbids—pressure on the primary employer through pressure from the secondary employer because of concerted pressure of secondary employees on that secondary employer. * * *"

If a purpose or an objective of the picketing was to crowd the Port of Mobile with foreign ships calling there to load and unload cargo, in order to bring pressure on the federal government to do something about the American merchant marine, or, if the picketing was being carried on with the hope or expectation or desire to shut down

the whole State Docks, not just the appellant, Mobile Steamship Company, so no one could work, then we think a substantial question would arise as to whether or not another intended purpose of the picketing was interference with appellee's business, which was the loading and unloading of ships. This situation called on the trial judge to exercise his discretion as to whether or not to grant a temporary injunction to maintain the status quo until a full hearing could be had before the court on the merits of the case. In his decision, he did not, in our opinion, abuse his discretion. We find no error in the trial judge's granting the writ of temporary injunction.

The appellants also assign as error the court's overruling their demurrer to the bill of complaint. Essentially the grounds of demurrer raise the same propositions of law to which we have written in this opinion. We see no need of speaking further to these legal issues.

The decree of the court entered by the trial judge in this cause is due to be affirmed.

AFFIRMED.

Coleman, Bloodworth, Faulkner, and Jones, JJ., concur.

I, J. O. SENTELL, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 3 day of May 1973.

J. O. SENTELL
Clerk, Supreme Court of Alabama

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1061

WINDWARD SHIPPING (LONDON) LIMITED, et al.,
Petitioners,

versus

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Brief On Behalf Of The
Mobile Steamship Association
As Amicus Curiae

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LIST OF AUTHORITIES

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IN THE
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No. 72-1061

WINDWARD SHIPPING (LONDON) LIMITED, et al.,
Petitioners,

versus

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Respondents.

On Petition For A Writ of Certiorari
To The Court Of Civil Appeals,
Fourteenth Supreme Judicial District of Texas

BRIEF ON BEHALF OF THE MOBILE STEAMSHIP ASSOCIATION AS AMICUS CURIAE

To The Honorable Judges of Said Court:

CONSENT OF PARTIES

All of the parties in this case have given their written consent to the filing of this brief and such written consents have been filed with the Clerk.

STATEMENT OF INTEREST

The Mobile Steamship Association is a non-profit corporation composed of members who are in the shipping business in the Port of Mobile. Its membership includes stevedoring companies, steamship agents, and steamship companies who do business at the Port of Mobile and includes substantially all of the different types of private employers who furnish shore-based employees and shore-based equipment to perform various services for shipowners while their vessels are in port.

The Mobile Steamship Association is interested in the outcome of this litigation because of the direct economic loss to its members caused by picketing of the type involved in this lawsuit.

Additionally, it is interested because it is a party to litigation that may be before this Court for review. On May 3, 1973, the Supreme Court of Alabama issued an opinion in the case of *American Radio Association v. Mobile Steamship Association, Inc.*, ____ Ala. ____, ____So.2d ____ 83 LRRM 2567 (May 3, 1973).[1] The unions-appellants' petition for rehearing was denied on July 5, 1973. We expect that by the time this brief is considered by the Court the unions will have filed a petition for writ of certiorari in that case, which involves an identical issue to that presented here.

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[1]The opinion of the Supreme Court of Alabama, not yet officially reported, is reprinted as an Appendix to the Supplemental Brief of Petitioners.

ARGUMENT

As conceded in the Respondents' Brief in Opposition in this case, the picketing in question at the Port of Houston was part of a larger campaign by the six maritime unions who represent virtually all seamen on American flag vessels. Picketing under the same design took place at several of this Country's major ports.[2] It was the economic loss resulting from this picketing that prompted the Mobile Steamship Association ("Mobile") to seek relief in the Alabama State Courts. It is the comprehension of the consequences if the Labor Management Relations Act were construed to give Respondents the protected right to utilize this sort of picketing to bar foreign ships from the Port of Mobile and from other United States ports that causes Mobile to file this brief.

The nature of the license sought by the Respondents can best be demonstrated by an examination of testimony presented in the Alabama trial court. In that regard, key parts of the testimony of Louis "Blackie" Neira, the Seafarers International Union's port agent in Mobile, were quoted verbatim by the Alabama Supreme Court in its opinion in *American Radio Association v. Mobile Steamship Association, Inc.*, Appendix to the Supplemental Brief of Petitioners at A18-A19, as follows:

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[2]Language on the picket signs and leaflets used in Mobile was identical to that used by the pickets in the case at bar.

[Cross examination by Mr. McRight]

"Q. What percentage of the vessels that call here at the Port [of Mobile] are of foreign flags?

"A. I would say about 70 to 80 percent.

"Q. Yes, sir. And it's your instructions from your International Headquarters to picket 70 or 80 percent of the vessels that call at the Port of Mobile?

"A. Within my resources, yes, to picket every one.

"Q. Allright, sir. And you would assume, as a man knowledgeable in the field of labor picketing that good labor men and good Union men would not cross those picket lines?

"A. We were hoping that they wouldn't do that.

"Q. Yes, sir. And this hope has been fulfilled in the Port of Mobile as far as longshoremen are concerned, isn't that true?

"A. Well, to a point, yes.

"Q. *Now, would it not be then a fair conclusion to say that you had hoped and do hope that you will be able to prevent 70 or 80 percent of the vessels in the Port of Mobile from loading or from unloading cargo?*

"A. *My hope is to clutter up the Port of Mobile with foreign flags — Liberian, Panamanian ships — to bring sufficient pressure on the United States Government to do something about the American merchant marine.*

"Q. *That's your intention?*

"A. *Yes, sir.*

"Q. *That's your purpose?*

"A. *Yes, sir.* (Emphasis supplied by the court)

* * * *

"Q. All right, sir. But you realize that your picketing is keeping members of the Mobile Steamship Association from loading and unloading these vessels that you are picketing, do you not?

"A. That is not the purpose of our picket line.

"Q. No, sir, I didn't ask you the purpose. You realize today that your picketing is preventing members of the Association from loading and unloading these vessels that you are picketing?

"A. *I hope that my picket line will shut the whole State Docks down and let everybody go home for a while. I hope I can do that. Not just the Mobile Steamship Association.*" (Emphasis supplied by the court)

Mr. Neira's admission that it was Respondents' goal to close the Port of Mobile to foreign flags, is truly frightening, especially when considered in terms of the Maritime Unions' power to achieve this objective absent judicial intervention. In the maritime industry whether in Mobile or elsewhere, one union's pickets — or as in this case, the pickets of several cooperating unions — can effectively shut down an entire port. The

events in the Port of Mobile are an excellent example of the devastating effect a picket line can have on a port and the ease with which Respondents' can achieve their intention of closing a port to foreign ships.

Picketing by the Respondents began in Mobile shortly after noon on November 3, 1971. At that time, farmers in the southern United States were harvesting their soybean crop, much of which was to be exported for sale overseas. An estimated 13,000,000 bushels of soybeans, valued in excess of $50,000,000, was in the fields of this state and in the elevators at the Alabama State Docks, waiting to be shipped through the Port of Mobile. Soybeans must be harvested when ripe, otherwise they will be lost. The elevators at the Alabama State Docks and other storage facilities can accommodate only a small amount of the annual crop so there must be a continuous flow through the dock facilities into ships for carriage.

Respondents' pickets brought an immediate halt to the loading and discharging of ships at the Port. As expected, longshoremen refused to cross Respondents' picket lines to load or discharge vessels. Thus, millions of bushels of soybeans were in danger of being lost through spoilage.

Additionally, member companies of the Mobile Steamship Association were losing in excess of $15,000.00 per day in fixed overhead costs while the picketing continued. Vessel demurrage costs ranging from $2,000.00 to $5,000.00 per day per vessel were forfeited. Ocean freight revenues were lost at the rate of $35,000.00 per vessel per day.

Other facets of the Mobile economy were affected by the picketing in the Port. It has been estimated that the Mobile economy loses in excess of $3,300,000.00 per week from a work stoppage in the Port. Thus, the work stoppage caused by Respondents had an immediate, significant impact on the economy of Mobile and its neighboring communities. Other forms of transportation, such as rail, barge and truck lines, which would have normally been busy moving cargo in and out of the Port were idled with resultant losses. Manufacturers dependent upon raw materials flowing through the Port were slowed in their production.

In addition to the dock workers who did not cross the picket lines, a large number of other employees directly connected with the industry had to be furloughed or laid off because of lack of work due to the picketing. The docks facilities of the State of Alabama which consisted of all of the public wharves in the Port of Mobile valued in excess of $50,000,000.00, were largely idled by the picketing.

The effect of Respondents' picketing in the Port of Mobile, if it had been allowed to continue, would have been disastrous in terms of the economic interests of Mobile and the area's farmers, which stood to lose incalculable sums of money and business because of Respondents' ability to close the Port with its pickets.

It is no exaggeration to say that if such picketing by Respondents is deemed to be protected under the National Labor Relations Act, then these unions would have a license to close all United States ports to foreign

flag shipping. Had such occurred in 1971, perishable agricultural exports such as the soybeans waiting in the Port of Mobile would have been lost, and the inward flow of imports of vital raw materials, such as petroleum and ores, would have been halted. Any halt in agricultural exports would have detrimentally affected our nation's balance of payments.

It is apparent that Congress, in enacting the Labor-Management Relations Act, envisioned that it would mitigate burdens to the free flow of commerce if American unions were given rights and powers which would enable them to represent their employees effectively in their relationships with employers. (See 29 U.S.C. Section 151). We submit, however, that nothing in that Act suggests that Congress intended to give American unions a protected right to impose boycotts on foreign ships, with whom they have no collective bargaining relationship and whose labor relations are not governed by American law, because the crew's wages on such ships are lower than those on American ships. We submit that the observation of this court in *Benz*[3] that for the labor Act to be applicable in this "delicate field of international relations there must be present the affirmative intent of Congress, clearly expressed" is very pertinent to the case at bar.

The decisions of this Court in *Benz, Incres,*[4] *and McCulloch,*[5] premised on the fact that "[t]he (National

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[3]*Benz v. Compania Naviera Hidalgo*, 353 U. S. 138 (1957).

[4]*Incres Steamship Company v. Int'l Maritime Workers Union*, 372 U.S. 24 (1963).

[5]*McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

Labor Relations) Act is concerned with industrial strife between American employers and employees"[6] compelled the conclusion that the National Labor Relations Board had no jurisdiction because the Labor-Management Relations Act does not apply to disputes which relate, as in the case at bar and the Alabama case, to the internal affairs of foreign ships, i.e. the wage levels of the crews.

Ariadne[7] does not, as Respondents contend, weaken our basis for reliance on *Incres*, *Benz* and *McCulloch* under the facts here. If anything, *Ariadne* strengthens it. Although *Ariadne* is authority for the proposition that peaceful picketing protesting substandard wages of American longshoremen employed on a casual or occasional basis to load or unload a foreign ship is governed by the Labor Act because "[t]he American longshoremen's short-term, irregular and casual connection with the respective vessels plainly belied any involvement with the ships' 'internal discipline and order' "[8], it is evident from the decision that the opposite must be true if the picketing is directed to the wages paid the foreign crew who are full time employees on the ship.

Respondents' picketing at Mobile temporarily closed the Port but, fortunately, the severe economic consequences facing farmers, shippers, manufacturers and the community as a whole, was averted when

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[6]*Benz*, 353 U.S. at 143, 144.

[7]*International Longshoremen's Association v. Ariadne Shipping Company*, 397 U.S. 195 (1970).

[8]397 U.S. at 200.

the State court examined the purpose of the picketing, concluded it was improper* and enjoined its continuation. We urge the Court to reject the Respondents' claim in the case at bar that State courts are preempted from adjudicating such cases.

Respectfully submitted,

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*The Alabama Supreme Court concluded:

> "If a purpose or an objective of the picketing was to crowd the Port of Mobile with foreign ships calling there to load and unload cargo, in order to bring pressure on the federal government to do something about the American merchants marine, or, if the picketing was being carried on with the hope or expectation or desire to shut down the whole State Docks, not just the appellant [sic] Mobile Steamship Company, so no one could work, then we think a substantial question would arise as to whether or not another intended purpose of the picketing was interference with appellee's business, which was the loading and unloading of ships." *American Radio Ass'n v. Mobile Steamship Association, Inc.*, Appendix to the Supplemental Brief of Petitioners at A20-A21.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief have been served on counsel for all parties herein by depositing the same in a United States mail box with first class postage prepaid, addressed to counsel of record at the following post office addresses on the ____ day of August, 1973:

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IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1061

WINDWARD SHIPPING (LONDON) LIMITED, *et al.*,
Petitioners,

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,
Respondents.

BRIEF FOR THE PETITIONERS

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AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,
Respondents.

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the District Court of Harris County, 164th Judicial District of Texas dated December 10, 1971 (A. 125)* has not been reported.

The opinion of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, dated May 17, 1972 (A. 125-138) is reported at 482 S. W. 2d 675.

The order of the Supreme Court of Texas, dated October 4, 1972, refusing petitioners' application for a writ of error (A. 139) was entered without opinion.

* "A" references are pages of the Joint Appendix.

Jurisdiction

The judgment of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas was entered on May 17, 1972. Petitioners' application to the Supreme Court of Texas for a writ of error was denied by order dated October 4, 1972. After being granted an extension of time in which to file a petition for a writ of certiorari by order dated December 8, 1972, Petitioners filed their petition on January 31, 1973. A writ of certiorari was granted on June 4, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3).

Questions Presented

1. Whether the State Court erred in holding that its jurisdiction was pre-empted by the Labor Management Relations Act, as amended, 61 Stat. 136 (1947), 29 U. S. C. §§141-187 ("the Labor Act") and that it could thus not adjudicate petitions filed by foreign shipowners for injunctive relief against picketing by American unions directed against foreign ships engaged in international trade, employing foreign crews working under foreign articles of agreement and represented by foreign unions and paid under foreign collective bargaining agreements, a stated object of which was to protest that the wages of such crews are substandard when compared to the wages of American crews on American ships and an intended and actual effect of which was to cause longshoremen and others not to cross the picket lines and thus to prevent such ships from loading or unloading cargo in an American port unless the wages of their crews were raised to American levels.

2. Whether the State Court erred in applying the rule in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959) that "[w]hen an activity is arguably subject to

Section 7 or Section 8 of the Act (the Labor Act), the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . .", *Id.* at 245 in a case which involved a dispute between foreign owners of foreign ships and American unions in which the latter were protesting the wage levels of the foreign crews on such ships, where this Court has held in *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138 (1957), *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10 (1963) and *Incres S.S. Co.* v. *International Maritime Workers Union,* 372 U. S. 24 (1963) that the Labor Act does not apply to disputes which relate to the internal affairs of foreign ships.

Statutes Involved

Petitioners contend that the Labor Act does not extend to the regulation of disputes between American unions and the owners of foreign ships which relate to the internal affairs of such ships. Sections 141, 151, 157 and 158 of the Labor Act are reprinted in an Appendix to this Brief.

Statement of the Case

The Parties

Petitioner Windward Shipping (London) Limited is a British corporation and is managing agent of the S.S. Theomana (A. 16-17). Petitioner SPS Bulkcarriers Corp. is a Liberian corporation and owner of the S.S. Theomana (A. 16). Petitioner Westwind Africa Line, Ltd. is a Liberian corporation and owner of the S.S. Northwind (A. 16). Respondents are American unions representing licensed and unlicensed seamen (A. 4-5, 9-10).

The Vessels and Their Crews

The S.S. THEOMANA and S.S. NORTHWIND are registered under the laws of Liberia and fly the Liberian flag (A. 16). The S.S. THEOMANA is a bulk carrier carrying bulk cargo and general cargo. The S.S. NORTHWIND is a dry cargo vessel (A. 17). The vessels are engaged in carrying cargo in international trade and do not carry cargo between United States ports (A. 16). The officers and crews of the vessels are all foreign nationals working under foreign articles of agreement and they are represented by foreign unions (A. 18-20, 22). The wages and other terms and conditions of employment of the crew members are governed by the articles of agreement and by collective bargaining agreements with the foreign unions (A. 18-20, 24-25). None of the officers or crews on the vessels is represented by any of the Respondents (A. 24).

The Picketing and Its Consequences

On October 23, 1971, the S.S. THEOMANA docked in the port of Houston, Texas to load a cargo for Bandar Shahpur, Iran. Loading of the vessel began the following day and continued until the evening of October 28, when members of Respondent unions began picketing at the gangway of the ship. Thereafter, longshoremen refused to cross the picket line, and the loading could not be completed (A. 38-41, Original Record, part 2A, page 70).

The S.S. NORTHWIND docked at Houston on the morning of October 29, 1971 to off-load a part cargo of coffee and to load a cargo of grain for Nigeria (A. 27, 31-33). Loading began within a few hours of the ship's arrival and continued until afternoon, when members of Respond-

ent unions began to picket at the gangway. Longshoremen thereafter refused to cross the picket line, and the ship was prevented from continuing to load the grain or to off load the coffee (A. 31-35). Because it was only partly loaded, the S.S. NORTHWIND was unseaworthy and could not sail (A. 34-35).

At a hearing on November 9, 1971, stipulations were made to the effect that the Respondents would permit certain limited work to be done for the ships so that they could be made seaworthy and able to sail, but without loading their intended cargoes, that the ships intended to call at United States ports in the future and that if they did they would be picketed again by the Respondents (A. 43-45).

The Purpose of the Picketing and the Nature of the Dispute

The picketing was carried on jointly by members of the Respondent unions. It was intended to and did have the effect of causing longshoremen and others engaged in unloading and loading the vessels to refuse to cross the picket lines and thus to prevent the completion of the unloading and loading of the vessels. (A. 17-18, 28-29, 78-79).

The pickets carried picket signs which read:

> "Attention to the public—The wages and benefits paid seamen aboard the vessel THEOMANA (NORTHWIND) are substandard to those of American seamen. This results in extreme damage to our wage standards and loss of our jobs. Please do not patronize this vessel. Help the American seaman. We have no dispute with any other vessel on this site" (A. 17).

The pickets also carried and passed out leaflets which read:

> "To the Public—American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.
>
> "American dollars flowing to these foreign shipowners at wages and benefits substandard to American Seamen are hurting our balance of payments in addition to hurting our economy by the loss of jobs.
>
> "A strong American Merchant Marine is essential to our National defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.
>
> "PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.
>
> "Our dispute is limited to the vessel picketed at this site, the S.S. " (A. 21).

The picketing involved in the case at bar was planned at a joint meeting of the American seamen's unions held on October 27, 1971 where it was determined to conduct "peaceful publicity picketing of foreign flag vessels engaged in transporting American sea-borne commerce from and to American ports" (minutes of meeting of American seamen's unions representatives, Defendants' Exhibit D-8, p. 3 (not reprinted), A. 68-75), and was related to contemporaneous picketing carried out against other foreign flag ships in Houston and in other U. S. ports (A. 75-76, 86).

The pickets were instructed in advance by the Respondent unions and the attorneys representing them not to reply to any questions concerning the purpose of the

picketing but merely to carry the signs and pass out the leaflets. These instructions were followed, and the picketing was peaceful (A. 94-95, 98, 104-107, 112-113).

A union witness testified at the trial that the object of the picketing was to get the foreign flag owners to increase the wages and improve the working conditions of the crews on the foreign flag ships so that American operators employing more highly paid American seamen would be more competitive with the foreign ships (A. 100-101). Another union witness, asked whether Respondents would have achieved their goal and would have ceased their publicity activities if the foreign flag operators had realized that they should pay their crews the same wages and benefits which American seamen receive and cause their ships to have American seamen's standard working conditions, testified that this was so (A. 81-82).

Notwithstanding the purposes and goals of the picketing, there is no evidence that the crews on board the vessels were not being paid in accordance with the vessels' articles of agreement and the various wage agreements signed with the foreign unions representing them. Moreover, there is no evidence that any of the Respondents contacted the Petitioners with a request to be recognized as the collective bargaining representative of the crews on the ships (A. 47-48).

There was considerable testimony introduced by the Respondents to the effect that foreign ships enjoy a cost advantage over American ships because the wage levels on foreign ships are lower than those on American ships, that this tends to make American ships uncompetitive with foreign ships and that over the years there has been a substantial decline in the number of American ships at sea and correspondingly in the number of jobs available to American seamen (A. 55-60, 99-100, 121-122).

There was also considerable testimony offered by the Respondents to the effect that the picketing was "publicity" picketing intended to protect the jobs of American seamen by calling to the attention of the public the loss of American jobs to foreign ships employing foreign seamen at wages which are "substandard" when compared to American wages, to request public support and cooperation and to ask the public to patronize American ships (A. 17-18, 70-72, 76-78, 82-84). It was also testified that the purpose of the picketing was to obtain more cargo for American flag vessels (A. 78).

Nevertheless, Respondents' action took the form of picketing the ships and handing out leaflets at shipside with the intention and expectation of causing longshoremen and others who were to perform services for the ships not to cross the picket lines and not to perform such services. In this respect the picketing was successful, because longshoremen did not cross the picket lines and the loading and unloading of the ships could not be accomplished (A. 31-34, 38-41, 78-79, 85). Moreover, so far as the record indicates, the only action which Petitioners could have taken to cause the pickets to be withdrawn was to increase the wages and benefits of the crews on their ships to American levels. (A. 81-82).

The Litigation

On October 30, 1971, Petitioners Windward Shipping (London) Limited and SPS Bulkcarriers Corp. filed an action in the District Court of Harris County, Texas, seeking temporary and permanent injunctive relief against Respondents' picketing.* That same day Petitioner West-

* On October 29, 1971, Petitioner Windward Shipping (London) Limited filed a charge with the NLRB alleging that certain activities of the Respondents directed against Rogers Terminal and Shipping Corporation were in violation of Section 8(b) (4) (B) of the Labor Act. The charge was withdrawn voluntarily on November 8, 1971 (A. 13-15, 23-24).

wind Africa Line, Ltd. filed a similar action. On November 8, 1971, Petitioners filed amended complaints in their respective actions, alleging, *inter alia,* that the picketing by Respondents was in violation of Article 5154d, Section 4, Texas Revised Civil Statutes, and that such picketing was an intentional tort. (A. 5-6) Respondents' answer alleged in part that the matters alleged by the Petitioners were within the jurisdiction of the NLRB and that the jurisdiction of the Texas state court was thus pre-empted. (A. 10-11)

The cases, consolidated by agreement of the parties, came on for hearing in the District Court on November 8, 1971. By agreement of the parties, the cases were tried on the merits as applications for permanent injunctive relief (A. 45). On December 10, 1971, the District Court entered a judgment of dismissal on the ground that the issues raised in the case were arguably subject to the exclusive jurisdiction of the NLRB and that the Texas court's jurisdiction was pre-empted (A. 125). The District Court did not decide other issues.

Petitioners appealed to the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas. (A. 125) The Republic of Liberia sought and obtained permission to appear as *amicus curiae* and filed a brief. (Original Record, part 6) In an opinion dated May 17, 1972, the Court of Civil Appeals affirmed the judgment of the District Court on the same pre-emption grounds and, like the District Court, did not discuss other issues. (A. 125-138) Petitioners moved for a rehearing, which was denied, and thereafter applied to the Supreme Court of Texas for a writ of error, which was refused (A. 139). The petition for a writ of certiorari was filed on January 31, 1973 and was granted on June 4, 1973.

Summary of Argument

The State Court disregarded or misconstrued controlling decisions of this Court in holding that its jurisdiction over a dispute between American unions and foreign ships, which involved picketing of the ships to protest that the wages paid to their foreign crews were "substandard" when compared to the wages paid American seamen on American ships, was pre-empted. This Court stated in *Benz* that the whole background of the Labor Act is concerned with industrial strife between American employers and American employees; in *McCulloch* this Court answered in the negative the question of whether the Act as written was intended to have any application to foreign registered vessels employing alien seamen; and in both *Benz* and *Incres* this Court held that the Labor Act does not govern picketing of a foreign ship manned by foreign seamen while the vessel is temporarily in an American port in a dispute which relates to the internal affairs of the ship.

If there was any doubt remaining after the Court's decisions in *Benz, McCulloch* and *Incres,* it was dispelled in *International Longshoremen's Association, Local 1416, AFL-CIO* v. *Ariadne Shipping Company,* 397 U. S. 195 (1970) which reaffirmed that the question which is determinative of the applicability of the Labor Act is "whether the . . . activities . . . were within the 'maritime operations of foreign flag ships' which *McCulloch, Incres,* and *Benz* found to be beyond the scope of the (Labor) Act" 397 U. S. at 200. Here, in contrast to *Ariadne,* Respondents were picketing in protest of the wage levels paid to foreign crews of foreign ships, a matter plainly within the maritime operations of the foreign ships.

As was held in *Benz* and *Incres*, it follows from the fact that the Labor Act does not apply that the picketing is not protected by Section 7 of that Act. Section 7 of the Labor Act does not purport to regulate picketing separately or independently of the other provisions of the Act. There exists no basis for giving the Act an interpretation which would accord to American unions a right protected by Section 7 to picket foreign ships engaged in international commerce, and thus prevent them from being loaded or unloaded when they visit American ports, when the overall regulation of labor relations and disputes relating to such ships is beyond the scope of the Act. Such an interpretation would involve a dismemberment of the Act.

The effect of an interpretation of the Labor Act which accorded American unions a federally protected right to conduct protest picketing against foreign ships whose wage levels are below those on American ships and thus to prevent them from loading or unloading cargo in American ports would be to increase rather than mitigate burdens to the free flow of commerce and would conflict with the very purposes of the Act as expressed in Sections 141 and 151 of the Act, 29 U. S. C. §§141, 151. It would also be inconsistent with principles of international law and treaties regarding the right of foreign vessels to trade freely to and from American ports.

The United States has embarked on a major program of assistance to the U. S. flag merchant marine through operating differential subsidies which offset the competitive disadvantage of American ships due to their higher wage costs, construction subsidies which offset the cost differential of building ships in the United States and abroad, and tax and other advantages. There is no basis in the Labor Act or elsewhere for attributing to Congress an intent to give unions a federally protected right to

bar foreign ships from our shores by unilateral picketing action because their wage costs are lower than those on American ships.

This Court in *Benz* and *McCulloch* noted that it ought not to give the Labor Act an interpretation which made it applicable to disputes which relate to the internal affairs of foreign ships without the clearly expressed intention of Congress in view of the potential embarassment to our foreign relations and the risk of retaliation against American ships. The danger of adverse international reaction is self-evident if the Act were interpreted as giving American unions a federally protected right to utilize picketing to bar foreign ships from our shores because their crews are not paid at American wage levels, particularly where, as here, a purpose of so doing is to gain more cargo for American flag ships.

The "arguably subject" rule of *Garmon* should not have been applied by the state court in this case, not only because the previous decisions of this Court in *Benz, McCulloch, Incres* and *Ariadne* have removed any arguability, but also because no danger of state interference with national policy of the sort with which this Court expressed concern in *Garmon* would result from a state court making an initial determination of whether the Act applies in a dispute involving the internal affairs of a foreign ship. The view expressed in the concurring opinions in *Ariadne* and *Taggart* v. *Weinacker's, Inc.*, 397 U. S. 223, 227 (1970) and the dissenting opinions in *Amalgamated Ass'n. of Street Employees* v. *Lockridge*, 403 U. S. 274, 302, 309 (1971) should be adopted by this Court where, as here, the initial question is not one of whether particular conduct of parties to a dispute between entities whose overall labor relations are governed by the Labor Act is protected, but rather one of whether the Act applies at all.

ARGUMENT

I. *Benz, McCulloch & Incres* hold that the Labor Act does not apply to labor disputes which relate to the internal affairs of foreign ships.

This Court has decided the issue of whether the Labor Act applies to disputes between American unions and foreign ships which relate to the internal affairs of such ships.

In *Benz* this Court stated that the question presented was ". . . whether the Labor Management Relations Act of 1947 applies to a controversy involving . . . the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port", 353 U. S. at 138-139, and held that it does not. The picketing by American unions in that case had as an object compelling the shipowner to re-employ crew members at more favorable wage rates than those agreed upon in the ships articles.* In *Benz*, as in

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* Significantly, one of the defendant union's contentions of fact, as set forth in the pre-trial order of the U. S. District Court in the *Benz* case, reflected an almost identical goal or justification for the picketing as that urged by Respondents in the case at bar:

> "The Sailors' Union of the Pacific and its members have an economic interest in the working conditions and wages of the seamen employed aboard the vessels engaged in said grain charter trade in which the plaintiff's vessel, the SS Riviera, was engaged; that the low wages and poor working conditions under which the plaintiff operated and continued to operate its vessel tended to undermine and destroy the standards set up and maintained by the Sailors' Union of the Pacific and other maritime unions who have members engaged in said trade; that as a result of the methods of operation by the plaintiff and by other shipowners operating in a similar manner, the plaintiff has been, and still is, able to underbid American shipowners for charters in said trade, and members of the Sailors' Union of the Pacific have been, and are now, deprived of employment in said grain charter trade." *Benz*, Supreme Court Record, p. 26.

the case at bar, the dispute related to the internal affairs of the ship, *i. e.*, the wages of the crew, and the Labor Act was held inapplicable to picketing by American unions in connection with such a dispute. The fact that a dispute also existed between the crew and the shipowner in *Benz* and not, so far as the record reveals, in the case at bar is not, we submit, a material distinction. It was the applicability of the Act to picketing by an American union which was in question in *Benz*, as here.

In *Incres* this Court stated that having held in *McCulloch* that the Labor Act has no application to the operations of foreign flag ships employing alien crews, "[t]herefore no different result as to Board jurisdiction follows from the fact that our immediate concern here is the picketing of a foreign-flag ship by an American union." 372 U. S. at 27.

The purpose of the picketing of foreign ships by American unions in *Incres* was both organizational and to protest "substandard" wages and working conditions on the ships. In *Incres* as here the unions urged from the outset that the picketing was protected because the foreign ships being picketed were in competition with American ships under contract with American unions, because the terms and conditions of employment on such ships were inferior to those of American ships, making the foreign shipowner's labor costs substantially lower than the labor costs of American ships, and because the differential in labor costs operated to the competitive disadvantage of American shipowners whose crews are represented by American unions. See *Incres*, Supreme Court Record, page 33, Defendant's amended answer, pars. 26, 28, 29.

These cases clearly held that the Labor Act is not applicable to, and thus neither protects nor prohibits, picketing of a foreign ship by an American union where the picketing is concerned with internal employer-employee relationships on such ship.

This Court emphasized in *Incres* that its decision in *Teamsters Union* v. *New York, N.H. & H.R. Co.*, 350 U. S. 155 (1956) ("the *Piggyback* case") does not lead to a contrary conclusion. In that case a railroad, whose labor relations were regulated by the Railway Labor Act, sought relief in a state court against picketing by the Teamsters Union which protested the policy adopted by trucking companies of "piggybacking" truck trailers on railroad cars. This Court pointed out in *Incres* that it was fundamental to the decision in the *Piggyback* case, which held the state court to be pre-empted by reason of the Labor Act, that the action was brought by the railroad in "circumstances unrelated to its employer-employee relations" in a situation where the union "was in no way concerned with (the railroad's) labor policy" 372 U. S. at 27.

Here the picketing was to protest "substandard" wages paid to the crews of the foreign ships as established by the ships' articles of agreement and was thus directly concerned with the foreign ships' labor policy. In addition we note that the considerations involved in this Court's decision in the *Piggyback* case, which involved reconciling a possible conflict between two American labor statutes, were quite different from those which are involved in determining whether an American statute applies to foreign ships.

If there was any doubt of what was intended in the *Benz, McCulloch* and *Incres* decisions, this Court's opinion in *Ariadne* removed it. There the American union was

picketing to protest "substandard" wages paid to American longshoremen hired in an American port to load foreign ships. This Court stated that the critical question to be answered in determining whether the Labor Act applied to the dispute was "whether the longshore activities of such American residents were within the 'maritime operations of foreign-flag ships' which *McCulloch, Incres,* and *Benz* found to be beyond the scope of the Act" and held the Act to be applicable because "[t]he American longshoremen's short-term, irregular and casual connection with the respective vessels plainly belied any involvement on their part with the ships' 'internal discipline and order' ", 397 U. S. at 200. This Court emphasized that "There is no evidence that these occasional workers were involved in any internal affairs of either ship which would be governed by foreign law. They were American residents, hired to work exclusively on American docks as longshoremen, not as seamen on respondents' vessels." 397 U. S. at 199-200.*

Just as it was plain that there was no involvement with the maritime operations of the ships or with their internal order on the part of the American longshoremen, whose "substandard" wage scales were the basis of the dispute in *Ariadne* and the cause of the foreign ships being subjected to protest picketing in that case, it is equally plain that the activities of the foreign crews, whose "substandard" wage scales were the basis of the dispute in the case at bar and the cause of the foreign ships being subjected to protest picketing, are at the heart of the maritime operations of the ships on which they serve. We submit that this Court's opinion in *Ariadne* makes

* This Court in a footnote, "put to one side situations in which the longshore work, although involving activities on an American dock, is carried out entirely by a ship's foreign crew, pursuant to foreign ship's articles." 397 U. S. at 199.

it quite clear that picketing in connection with such a dispute is not governed by the Labor Act.

II. The Labor Act should not be interpreted to give Respondents a federally protected right to bar foreign ships from United States ports by protest picketing concerned with the level of wages paid to their crews.

A. The Arguably Protected Status of Area Standards Picketing in Domestic Disputes Does Not Apply Here Where There Are Important Factors to Be Considered Not Present in Domestic Disputes

Respondents argued below and the Texas Court found that the picketing was arguably protected by Section 7 of the Labor Act, citing *Ariadne* for the proposition that a union's peaceful picketing to protest wage rates below established area standards arguably constitutes protected activity under Section 7.*

We submit that this Court was at pains to make it clear in *Ariadne* itself that the arguably protected status of so-called "area standards" picketing, (see *International Hod Carriers Union, Local No. 41, (Calumet Contractors Ass'n), 133 NLRB No. 57 (1961) and Houston Building and Construction Trades Council (Claude Everett Construction Co.)*, 136 NLRB No. 28 (1962)) is not applicable where the dispute relates to the internal affairs of foreign flag ships. It was determined in *Benz* and *Incres* that picketing conducted by American unions in disputes which relate to internal affairs of foreign ships is not protected by Section 7 because the Labor Act is not applicable. It

* The legality or illegality under Texas law of the picketing by the Respondents was not decided by the Court below and is thus not in issue here.

was irrelevant in those cases that the picketing might have been protected had the dispute been, for example, over wages paid to American seamen on American ships and thus governed by the Labor Act.

So-called "area standards" picketing cases which have come before the NLRB have involved purely domestic disputes wherein the picketed employer filed a charge with the NLRB that the picketing had an object of organizing the employees or seeking recognition and thus fell within the union unfair labor practice provisions of sections 8 (b) (4) (C) or 8 (b) (7) (C) of the Labor Act.

The NLRB held in the *Calumet* and *Claude Everett Construction Company* cases that picketing to protest wages paid by employers which are substandard to those paid by other employers in the area whose employees are represented by the picketing union does not in and of itself amount to picketing for organizational or recognitional purposes within the meaning of sections 8 (b) (4) (C) and 8 (b) (7) (C). These cases were 3-2 decisions of the NLRB in which the minority held to the earlier view of the Board expressed in *International Hod Carriers Union, Local No. 41 (Calumet Contractors Ass'n)*, 130 NLRB 78, 81-82 (1961) that where the object of picketing is to force an employer to raise wages to the same level as those negotiated by the union with other employers in the area, the union is attempting to obtain concessions normally resulting from collective bargaining, and thus the picketing should be treated for purposes of section 8 (b) (4) (C) and 8 (b) (7) (C) as equivalent to picketing with the object of compelling an employer to bargain with the union.

These cases were not concerned with the question of pre-emption or with picketing over the level of wages

paid to foreign crews on foreign ships. Notwithstanding the current interpretation of the NLRB that a distinction exists between area standards picketing and organizational or recognitional picketing for the purposes of sections 8 (b) (4) (C) and 8 (b) (7) (C), such distinctions are irrelevant here.

B. The Policy of Congress Is to Offset By Subsidies the Competitive Disadvantage Which American Ships Suffer By Reason of Their Higher Operating Costs

We do not contest the fact that the wages of foreign crews on foreign ships are substantially lower than those paid to American seamen on American ships.* Nor do we contest the fact that as a result partly of the higher operating and other costs of American ships, the ability of American ships to compete with foreign ships in international shipping has been affected. But this whole question has been given close attention by Congress, which has taken positive action to deal with the problem on a broad scale.

It is, we believe, highly relevant that in 1970 a greatly expanded program for aiding the American merchant marine was enacted as the Merchant Marine Act of 1970, P. L. 91-469, 84 Stat. 1018 (1970).

In enacting this new maritime program, Congress recognized that "[i]n general, merchant ships of the world trade internationally in accordance with principles of

* It has been said that the wage costs on American ships are in the area of two and one-half to four times higher than those on foreign ships and that the wages of an able bodied seamen on an American ship are, for example, only slightly below those of the captain of an Italian ship. Hearings on H. R. 12324, H. R. 12569 before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries, 92nd Cong., 2nd Sess., Ser. 92-21, Pt. 2 at 713, 738 (1972).

freedom of the seas and open ports," and observed: "Accordingly, U. S. merchant vessels are in direct competition with foreign flag carriers for available cargos. . . . Since for over a century American vessel construction and operating costs, reflecting the relatively higher standard of living in the United States, have generally been higher than those of other maritime nations, the American vessel operator is at a direct competitive disadvantage. . . .

"Consequently, we must accept the burden of continuing to provide some form of direct government support for our merchant fleet in foreign commerce." Senate Report No. 91-1080, 91st Congress, 2d Sess., U. S. Code Cong. and Ad. News, 1970, p. 4190.

Under the Merchant Marine Act of 1970 the United States has embarked on an extensive program designed to make American ships competitive with foreign ships. This program includes direct subsidies to American shipowners to make up the difference in the costs of operating United States flag and foreign flag vessels, construction subsidies to make up the difference between ship construction costs in the United States and abroad, and important special tax benefits.*

Congress presumably might have legislated, as part of the Merchant Marine Act of 1970, that, in order to make American flag ships competitive with foreign flag ships, only those foreign flag ships whose crews are paid at

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* For a description of the scope of such program plus other forms of government assistance to the American merchant marine see Senate Report 91-1080, *supra;* "The Economics of Federal Subsidy Programs," a compendium of papers submitted to the Subcommittee on Priorities and Economy in Government of the Joint Economic Committee, Congress of the United States, Part 6, Transportation Subsidies, February 26, 1973, pp. 763-795; "Setting National Priorities The 1972 Budget" The Brookings Institution, 1971, pp. 267-271.

American wage levels would be permitted to carry cargo to or from American ports. It did not do so. Nevertheless, Respondents are urging that this court should interpret the Labor Act as according to them a federally protected right to utilize picketing to bar foreign ships from trading in and out of our ports when in their unilateral opinion such action would help the American merchant marine. We submit that such an interpretation not only is unsupported by any legislative history indicating that the Labor Act is intended to apply to disputes which relate the internal affairs of foreign vessels (see *Benz*), but also that such an interpretation would ignore other important policies and interests of the United States, including the means that Congress has selected in the Merchant Marine Act of 1970 to aid the American merchant marine, the effect which such interference with foreign ships may have on the flow of American exports of grain and other products to world markets and on the ability of the United States to import vital raw materials, and the effect of such interferences on American ports, and on the commercial and political relationships of the United States with foreign nations. As this Court pointed out in *Benz*,

> "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision when the possibilities of international discord are so evident and retaliative action so certain." 353 U. S. at 147.

Certainly, we do not think that any protection which the NLRB has construed the Labor Act to give to area standards picketing should be applied to picketing related to a dispute involving "substandard" wages on foreign ships

without the intention of Congress being clearly expressed that it should be so construed. This is particularly true when Congress has enacted a substantial and unique program to offset the cost differentials between United States ships and foreign ships with subsidies and other aids.

C. The Labor Act Is an Interrelated and Interdependent Act Which Must Be Treated As a Whole.

The Labor Act is, as this Court observed in *Garmon*, "a complex and interrelated federal scheme of law, remedy, and administration" 359 U. S. at 243. It is comprised of interdependent provisions intended to form a legal framework for organizing, collective bargaining and the conduct of labor disputes which strikes a balance between employer and union interests by protecting some activities and prohibiting others. See *American Ship Building Co.* v. *NLRB*, 380 U. S. 300 at 316, 317 (1965); *Local 1976, United Brotherhood of Carpenters and Joiners of America* v. *National Labor Relations Board*, 357 U. S. 93 at 99, 100 (1958). The original Wagner Act, 49 Stat. 449 (1935) was amended in 1947 by the Taft-Hartley Act, 61 Stat. 136 (1947) in order by making unlawful certain union activities, to achieve this balance. See S. Rep. No. 105, 80th Cong. 1st Sess. 2 (1947); 93 Cong. Rec. 7537 (1947). The balance was further adjusted by the Landrum-Griffin Act in 1959 (73 Stat. 519 (1959)).

The Labor Act contemplates that picketing will in some situations be lawful and in others unlawful, but the Labor Act must be viewed as a whole, as is quite clear from this Court's decisions in *Benz*, *McCulloch*, *Incres.* and *Ariadne*, and its regulation of picketing is structured in the context of its overall regulation of the conduct of labor relations and its intended balancing of the interests of employers and employees who are subject to its provisions.

As stated earlier, *Benz, McCulloch* and *Incres* held that the Act is not applicable to disputes relating to the internal affairs of foreign ships and to the activities or conduct of the parties to such disputes. The effect of these decisions is twofold. On the one hand, for example, an American union cannot petition the NLRB to direct a representation election among the foreign crew of a foreign ship or apply for an order prohibiting a foreign shipowner from engaging in an employer unfair labor practice in violation of Section 8(a) of the Labor Act. See also *NLRB* v. *Natural Gas Utility District of Hawkins County*, 402 U. S. 600 (1971). On the other hand a foreign shipowner involved in such a dispute cannot obtain relief from the NLRB against union activity which, were the Labor Act applicable, might constitute a union unfair labor practice under Section 8(b) of the Labor Act except, perhaps, in the case of his being subjected to a secondary boycott. See *Teamsters Union* v. *New York, N. H. & H. R. Co., supra.*

A foreign shipowner subjected to protest picketing is in a wholly different position from that of an American employer subjected to protest picketing whose labor relations are in every respect governed by that Act. To give an example, the NLRB, in the light of *Incres,* would clearly have no jurisdiction to proceed on a charge filed by a foreign shipowner that picketing directed against him had a bargaining or recognitional purpose and was being carried on in violation of Section 8(b)(7)(C). See also *Hanna Mining Co.* v. *District 2, Marine Engineers Beneficial Ass'n.,* 382 U. S. 181 at 188 (1965). Indeed, Section 8(b)(7)(C) says that a union cannot carry on recognitional picketing for more than a reasonable time not exceeding thirty days unless a petition for an election has been filed under Section 159(c), but the NLRB would not have jurisdiction to conduct such an election, see *McCulloch.* Thus,

if this Court were to hold that picketing to protest substandard wages of a foreign crew is protected by the Labor Act, the result might be that picketing would be protected by the Labor Act if it were found not to have a bargaining or recognitional purpose, but, if the picketing violated 8(b)(4(C) or 8(b)(7)(C), the foreign shipowner would be unable to secure relief under the Labor Act, because the Labor Act would not apply. It seems self-evident that Congress could not have intended such an incongruous result. As was stated in *L. B. Wilson, Inc.* v. *FCC*, 170 F. 2d 793, 800, (D. C. Cir. 1948): "[n]othing but unmistakable language will warrant such construction of a statute as will produce unequal operation thereof." We submit that there is no basis for construing the Act in such a way that some of its provisions are applicable to regulate the conduct of the parties to a dispute when other provisions are not; we submit that the Act cannot be thus dismembered.

The fundamental purposes of the Labor Act are to alleviate and mitigate obstructions to the free flow of commerce by protecting the right of employees to form unions and bargain collectively, subject to certain restrictions as to their conduct and the conduct of employers. See 29 U. S. C. §§141, 151; *American Communications Ass'n, CIO* v. *Douds*, 339 U. S. 382, 387 (1950). Respondents seek an interpretation of the Act which would accord to them a federally protected right to picket foreign ships engaged in international trade so as to prevent them from being loaded or unloaded—in other words, a right to obstruct commerce by effectively barring such ships as they choose to picket from American ports because the seamen on board are paid less than American seamen on American ships. They seek federal protection of such picketing notwithstanding that the fundamental means by which the Labor Act seeks to mitigate obstructions to commerce, i.e., through the establishment of a legal framework for

collective bargaining as a means of avoiding such disruptions, see *American Ship Building Co.* v. *N. L. R. B., supra,* at 316, 317, is not, as this Court has found, applicable to foreign ships.

Notwithstanding that Respondents' objectives of protecting the jobs of their members and aiding the American merchant marine are perfectly valid, we submit that it would be inconsistent with the Labor Act's declared purposes to interpret the Act as affording a protected right to obstruct commerce in circumstances where, as here, all of the Act's provisions which go to provide a legal framework for the resolution of disputes through collective bargaining are not applicable.

D. Relevant Principles of International Law and Treaty Obligations Must Be Considered in Determining the Reach of the Labor Act in the Circumstances of This Case.

This Court in *Benz* was concerned not to attribute to the Labor Act a construction which would result in international discord and create the likelihood of retaliative action by foreign nations without the affirmative intention of Congress clearly expressed. 353 U. S. at 147. In *McCulloch* too this Court was concerned not to adopt any procedure which might require the NLRB to inquire into the internal discipline and order of foreign flag vessels, pointing out the risk of disturbance in our international relations which could be expected in the light of treaty and international law provisions which recognize the sovereignty of the flag state over matters relating to the internal affairs of such ships. 372 U. S. at 19-21.

We respectfully draw to the Court's attention the following passage from C. J. Colombos, The International Law of the Sea 176-177 (6th Ed. 1967):

> §181. *General principles applicable to ports.*— The right of sovereignty recognised to a State should not, in fact, be construed as conferring upon it an unlimited power to prohibit the use of its ports and harbours to foreign nationals. This would imply a neglect of its duties for the promotion of international intercourse, navigation and trade which customary international law imposes upon it. It is submitted that the general principles applicable to ports, harbours and roadsteads are capable of being summarised as follows: (i) in time of peace, commercial ports must be left open to international traffic. The liberty of access to ports granted to foreign vessels implies their right to load and unload their cargoes; enbark and disembark their passengers. This principle was reiterated by the late Professor Sauser-Hall in his award in the *Saudi-Arabia* v. *Aramco* arbitration of 1958. As he said: "according to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require. Freedom for foreign vessels to enter the ports of a State implies the right to load and unload goods."

We wish also to call to the Court's attention the Treaty of Friendship, Commerce and Navigation between the United States and Liberia, 54 Stat. 1739 (1939), relevant because the vessels involved in the case at bar are Liberian vessels. The Treaty provides generally for freedom of commerce and navigation between the two nations. Article VII states:

> "Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Con-

tracting Parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation." 54 Stat. 1742 (1939).

Article XVI states:

"Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties shall be permitted to discharge portions of cargoes at any port open to foreign commerce in the territories of the other High Contracting Party, and to proceed with the remaining portions of such cargoes to any other ports of the same territories open to foreign commerce, without paying other or higher tonnage dues or port charges in such cases than would be paid by national vessels in like circumstances, and they shall be permitted to load in like manner at different ports in the same voyage outward. . . ." 54 Stat. 1745-46 (1939).

To construe the Labor Act as giving unions a federally protected right to bar foreign ships from our ports by picketing would, we submit, be inconsistent with the above-mentioned principles of international law and with the obligations expressed in the Treaty with Liberia.

III. The State Court erred in applying the "arguably subject" rule expressed in *Garmon*.

The Texas Court stated that its primary inquiry was whether the picketing in question was arguably prohibited or protected under the Labor Act, citing *Garmon*. We submit that the "arguably" rule expressed in *Garmon* is

inapplicable in the context of this case, not only because of the decisions of this Court which hold the Labor Act to be inapplicable to disputes which relate to the internal affairs of foreign ships, but also because this Court stated in *Garmon* itself that activities which were "a merely peripheral concern" of the Labor Act were not withdrawn from the states' power of regulation, 359 U. S. at 243, and because the application of the "arguably" rule of *Garmon* to cases in the field of foreign shipping has resulted in unnecessary litigation of the question of "arguability" without furtherance of any significant federal policy. The concurring opinions in *Ariadne* of Mr. Justice White joined in by the Chief Justice and Mr. Justice Stewart, the concurring opinion in *Taggart* v. *Weinacker's, Inc.*, 397 U. S. 223, 227 (1970) and the dissenting opinions in *Amalgamated Ass'n. of Street Employees* v. *Lockridge*, 403 U. S. 274, 302, 309 (1971) appear to disapprove the "arguably" rule as such. While we agree with the principles expressed in these opinions, and in particular the point that there is no effective mechanism for an employer to obtain a ruling from the NLRB as to whether or not a particular activity is protected by the Labor Act, our argument here is limited to the applicability of such a rule to cases involving disputes with foreign ships employing foreign crews which are related to the wages or working conditions of such crews, *cf. Ariadne.*

As noted earlier, this Court pointed out in *Benz* that "[t]he whole background of the Act is concerned with industrial strife between American employers and employees," 353 U. S. at 143, 144. Even if disputes involving foreign ships and foreign seamen were subject in some fashion to regulation under the Labor Act, and again we submit that they plainly are not, the need expressed in *Garmon* for initial determination by the NLRB "if the danger of state interference with national policy is to be averted," 359 U. S. at 245, would not exist. The issues in

such cases are at most not central to the regulation of industrial strife between American employers and American employees with which the Labor Act and national labor policy is concerned.

Finally, we believe that there is a fundamental distinction between a situation where both parties to a dispute are subject to American labor jurisdiction, and the question to be determined is whether or not particular conduct of the parties is either protected or prohibited by the Labor Act, and a situation, such as the present case, where the matter in issue is the threshold question of whether Congress intended the very scope and reach of the Act to extend to the conduct of parties to disputes relating to employer-employee relationships on foreign ships. In this latter area, where the possibility of causing serious problems in the relations of this country with other maritime nations is a matter of concern which this Court has recognized in its previous decisions, the NLRB has no special expertise and moreover no effective procedures for resolving the question.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas should be reversed and the case remanded for further proceedings.

Dated: August 14, 1973

Respectfully submitted,

James V. Hayes
Robert S. Ogden, Jr.
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Of Counsel:

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APPENDIX

29 U. S. C. §§ 141, 151, 157 and 158

§ 141. Short Title; Congressional Declaration of Purpose and Policy

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. June 23, 1947, c. 120, § 1, 61 Stat. 136.

§ 151. Findings and Declaration of Policy

The denial by some employers of the rights of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife of unrest, which have the

intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and mem-

bers have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947. c. 120, Title I, § 101, 61 Stat. 136.

§ 157. Right of Employees as to Organization, Collective Bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

§158. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the

effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry effecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object there is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain

with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the pur-

pose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an em-

ployer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 15-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract

or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, any any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined

in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title. July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub. L. 86-257, Title II, § 201(e), Title VII §§704(a)-(c), 705(a), 73 Stat. 525, 542, 545.

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1973

No. 72–1061

WINDWARD SHIPPING (LONDON) LIMITED, *et al.*,

Petitioners,

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

PETITION FOR CERTIORARI FILED JANUARY 31, 1973

CERTIORARI GRANTED JUNE 4, 1973

INDEX

* These items are not printed in this Appendix but were included in the Appendix to the Petition for Certiorari.

Chronological List of Relevant Docket Entries

October 30, 1971 Petition of plaintiffs Windward Shipping (London) Limited and SPS Bulkcarriers Corp., seeking temporary and permanent injunctive relief against picketing by defendant unions, filed in the District Court of Harris County, Texas, 55th Judicial District.

October 30, 1971 Petition of plaintiff Westwind Africa Line, Ltd., seeking temporary and permanent injunctive relief against picketing by defendant unions, filed in the District Court of Harris County, Texas, 61st Judicial District.

November 8, 1971 Amended petition of plaintiffs Windward Shipping (London) Limited and SPS Bulkcarriers Corp. filed in the District Court of Harris County, Texas, 55th Judicial District.

November 8, 1971 Amended petition of plaintiff Westwind Africa Line, Ltd. filed in District Court of Harris County, Texas, 61st Judicial District.

November 8, 1971 Defendants' Answer to Plaintiffs' Amended Petitions * for Injunction filed in the District Court of Harris County, Texas, 164th Judicial District.

November 8-9, 29-30, 1971 Trial of actions before the District Court, Harris County, Texas, 164th Judicial District.

December 10, 1971 Judgment dismissing the cases for lack of jurisdiction entered by the District Court of Harris County, Texas, 164th Judicial District.

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* The action by Windward Shipping (London) Limited and SPS Bulkcarriers Corp. and the action by Westwind Africa Line Ltd. were consolidated by agreement of the parties on November 8, 1971.

Chronological List of Relevant Docket Entries

December 10, 1971 Plaintiffs' Notice of Appeal to Court of Civil Appeals of Texas entered in the District Court of Harris County, Texas, 164th Judicial District.

May 17, 1972 Judgment affirming the judgment of the District Court of Harris County, Texas, 164th Judicial District, rendered and opinion filed by Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas.

June 14, 1972 Order of Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, overruling appellants' motion for rehearing, rendered.

July 14, 1972 Petitioners' application for a Writ of Error to the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, filed in Supreme Court of Texas.

October 4, 1972 Order of Supreme Court of Texas refusing the application of petitioners for a writ of error to the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, entered.

Plaintiffs' First Amended Petition for Injunction.
Filed: November 8, 1971.

IN THE

DISTRICT COURT OF HARRIS COUNTY, TEXAS

55TH JUDICIAL DISTRICT OF TEXAS

No. 889002

WINDWARD SHIPPING (LONDON) LIMITED & SPS BULKCARRIERS CORP.

VS.

AMERICAN RADIO ASSOCIATION AFL-CIO, INTERNATIONAL ORGANIZATION OF MASTER MATES AND PILOTS AFL-CIO, NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION AFL-CIO, NATIONAL MARITIME UNION OF AMERICA AFL-CIO, RADIO OFFICERS UNION OF THE UNITED TELEGRAPH WORKERS AFL-CIO & SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA AFL-CIO

FIRST AMENDED PETITION FOR INJUNCTION

To The Said Honorable Court:

Comes now Windward Shipping (London) Ltd., Plaintiff herein and SPS Bulkcarriers and files its first Amended Complaint herein, and complaining of (1) American Radio Association, AFL-CIO, (2) International Organization of Masters, Mates and Pilots, AFL-CIO, (3) National Marine Engineers Beneficial Association, AFL-CIO, (4) National Maritime Union of America, AFL-CIO, (5) Radio Officers Union of United Telegraph Workers, AFL-CIO, and (6) Seafarer's International

Union of North America, AFL-CIO, Defendants, herein alleges and says:

I.

The Plaintiff Windward Shipping (London) Limited is a British corporation.

The Plaintiff SPS Bulkcarriers Corp. is a Liberian corporation.

II.

The Plaintiff SPS Bulk Carriers Corp. owns a vessel, the SS Theomana, of Liberian registry, which is presently afloat in navigable waters of Harris County, Texas, which is unable to load a cargo of grain because of the unlawful conduct of the Defendants, their officers, agents, servants, representatives and persons acting in concert with them, as the same will be detailed hereafter.

III.

The Plaintiff is signatory to a labor agreement with a labor union known as Pan Hellenic Seamen's Federation and in addition it has entered into employment contracts with certain members of the crew who are not covered by said Pan Hellenic Seamen's Federation agreement. Both of such agreements cover the wages, hours and other conditions of employment of the crew of the vessel SS Theomana, both of such contracts are currently in full force and effect.

IV.

The Defendant Unions are Labor Unions whose officers and crews sometime man vessels of United States Registry but none of which are employed by or work for or perform services on or connected with the SS Theomana or any

other vessel owned by the Plaintiffs. The activities of the Defendants, their officers, agents and employees are not protected by the Labor Management Relations Act, as amended.

V.

The vessel SS Theomana is not in commerce or engaged in activities affecting commerce as the same is defined by the National Labor Relations Act, as amended, and in fact, the United States Supreme Court has held in *McCullouch et al, members of the National Labor Relations Board* vs. *Sociedad Nacional de Marineros De Honduras,* 372 U. S. 10 (1963) and other cases, that the jurisdictional provisions of the National Labor Relations Act do not extend to maritime operations of foreign flag ships employing alien seamen.

VI.

Some of the members of the crew of the SS Theomana are members of the Pan Hellenic Seamen's Federation as aforesaid, and all are foreign nationals and none are citizens of the United States of America. All of the officers on such vessel are likewise foreign nationals. The crew of the vessels covered by the agreement between Plaintiff and the Pan Hellenic Seamen's Federation and the individual seamen and there is no dispute in either case between the crew and the Plaintiff under such agreements.

VII.

On or about October 29, 1971, the Defendants, acting in concert with each other by joint handbilling, joint picketing and other concerted activities, have caused members of the International Longshoremen's Association to re-

fuse to work the ship of the Plaintiff and the purpose of such picketing was to cause the Plaintiff, by economic pressure exerted through the International Longshoremen's Association, to breach its contract with Pan Hellenic Seamen's Federation and/or the individual contracts with the seamen by such economic pressure, contrary to the provisions of Article 5154d, Sec. 4 of the Revised Civil Statutes of Texas, and contrary to Sec. 353 and 357 of the Maritime of the Republic of Liberia.

VIII.

The Defendants knew when they engaged in the activities aforesaid that the members of the International Longshoremen's Association and other Unions would observe and respect the picket lines of the Defendants and in fact, officers of the International Longshoremen's Association have publicly stated and testified under oath that the members of that Union would not cross the picket lines of any union and with such knowledge they knew that their unlawful conduct as aforesaid would be accomplished unless such conduct were restrained. The Defendants knew that the picketing would interfere with the operations of Plaintiff and pursued the unlawful course of conduct with intention to do so.

IX.

Further, such conduct by the Defendants under the circumstances stated above, is an intentional tort for which the Plaintiff has no remedy at law.

X.

The Plaintiff is suffering and will continue to suffer irreparable injury by injury to its business reputation as reliable transporters of cargo and is suffering monetary

damages which are not ascertainable and for which it has no adequate remedy at law. The Plaintiff will continue to suffer such irreparable injury if not enjoined by this Court.

Wherefore, Plaintiff prays that the Defendants, their officers, agents, servants, representatives and persons acting in concert with them, be enjoined from picketing, handbilling or otherwise interfering with or attempting to cause the Plaintiff to breach its contract with Pan Hellenic Seamen's Federation and/or the individual contracts with the seamen, or violating the laws of the State of Texas and the Republic of Liberia or otherwise disrupting or interfering with the internal order and economy of Plaintiffs vessel and from causing the Plaintiff irreparable damage or harm.

Respectfully submitted,

W. D. Deakins, Jr.
W. D. Deakins, Jr.

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.....
Ben L. Reynolds

Attorneys for Plaintiffs

(Sworn to by W. D. Deakins, Jr. and Ben L. Reynolds, November 8, 1971.)

Defendants' Answer to Plaintiffs' First Amended Petition for Injunction. Filed: November 8, 1971.

IN THE

DISTRICT COURT OF HARRIS COUNTY, TEXAS

164TH JUDICIAL DISTRICT OF TEXAS

No. 889,002

WINDWARD SHIPPING (LONDON) LIMITED & SPS BULKCARRIERS CORP.

vs.

AMERICAN RADIO ASSOCIATION AFL-CIO, INTERNATIONAL ORGANIZATION OF MASTER MATES AND PILOTS AFL-CIO, NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION AFL-CIO, NATIONAL MARITIME UNION OF AMERICA AFL-CIO, RADIO OFFICERS UNION OF THE UNITED TELEGRAPH WORKERS AFL-CIO & SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA AFL-CIO

No. 889,003
(Consolidated Under No. 889,002)

WESTWIND AFRICA LINE, LTD.

vs.

AMERICAN RADIO ASSOCIATION AFL-CIO, INTERNATIONAL ORGANIZATION OF MASTER MATES AND PILOTS AFL-CIO, NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION AFL-CIO, NATIONAL MARITIME UNION OF AMERICA AFL-CIO, RADIO OFFICERS UNION OF THE UNITED TELEGRAPH WORKERS AFL-CIO & SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA AFL-CIO

DEFENDANTS' ANSWER TO PLAINTIFFS' FIRST AMENDED PETITION FOR INJUNCTION

To The Said Honorable Court:

Now Come Defendants by their attorneys of record and make this their answer to the amended petitions of the Plaintiffs.

I.

Defendants admit the allegations contained in Paragraph I in Plaintiffs' First Amended Petitions for Injunction.

II.

Defendants deny knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraphs II and III, except admit that the SS Theomana and the SS Northwind bear the Liberian flag, are presently afloat in the navigable waters of Harris County, Texas, and have in their employ various crew members who are foreign nationals and not members of Defendant labor organizations; Defendant labor organizations do not have any controversy concerning the terms and conditions of employment, including wages and hours, with the SS Theomana or the SS Northwind, nor do Defendant labor organizations purport to or seek to represent any of the employees on the SS Theomana or the SS Northwind.

III.

Defendants deny each and every allegation contained in Paragraph IV, except admit that Defendants are labor organizations or affiliates thereof and through their members or agents, none of which are employed or work for the SS Theomana or the SS Northwind, acting singly and

in concert have established and participated in an informational picket line immediately proximate to the SS Theomana and the SS Northwind, which picket line advises the public of the plight of the American seamen and the threat to their work standards and jobs and asks those members of the public who sympathize with them to help preserve the job standards of the American seamen and to help preserve the American Merchant Marine.

IV.

Defendants deny each and every allegation contained in Paragraph V and demand strict proof thereof.

V.

Defendants admit the allegations contained in Paragraph VI.

VI.

Defendants deny each and every allegation of Paragraphs VII, VIII, IX, and X and demand strict proof thereof.

VII.

Defendants would show that this Honorable Court may not grant the relief requested by the Plaintiffs herein because jurisdiction over the subject matter of this dispute and over the parties thereto does not lie within the province of this Honorable Court but is pre-empted to the National Labor Relations Board by the National Labor Relations Act (29 U. S. C. A. §151, et seq.). In this regard Defendants would show that Plaintiff Windward Shipping London Limited filed an unfair labor practice charge before the National Labor Relations Board on October 29,

1971, against all of the same parties who are Defendants here. (Case No. 23-CC-416, a copy of which is attached to this Answer).

VIII.

Defendants would further show that this Honorable Court may not grant the relief sought by the Plaintiffs because the Norris-LaGuardia Act (29 U. S. C. A. §101 et seq.) prohibits the issuance of any restraining order or temporary or permanent injunction by a State or Federal court in a peaceful labor dispute between parties in interstate commerce.

IX.

Defendants would further show that the informational picketing engaged in by Defendants is lawful and proper and in accordance with the exercise of the rights granted to them by Article I, Section 8 of the Constitution of the State of Texas and by the First and Fourteenth Amendments to the Constitution of the United States of America.

X.

Defendants would further show that the State statute under which Plaintiffs bring this proceeding, to wit, Article 5154d(4) of Vernon's Texas Civil Statutes Annotated ("Picketing") is unconstitutional on its face in that it is void for vagueness, overbroad and produces a chilling effect on the Defendants' exercise of the rights granted to them by Article I, Section 8 of the Constitution of the State of Texas and by the First and Fourteenth Amendments to the Constitution of the United States of America.

XI.

Defendants would further show that the State statute under which Plaintiffs bring this proceeding, to wit, Article

5154d(4) of Vernon's Texas Civil Statutes Annotated ("Picketing") would be in violation of the rights granted to Defendants by Article I, Section 8 of the Constitution of the State of Texas and by the First and Fourteenth Amendments to the Constitution of the United States of America if it is applied or held by this Honorable Court to prohibit or make unlawful the conduct of informational picketing in which Defendants are engaging.

XII.

Defendants would further show that Plaintiffs may not be granted the equitable relief that they seek since they come to this Honorable Court with unclean hands in opposition to the public policy of the United States of America as set forth in 46 U. S. C. A., Section 1101 and Section 1241.

WHEREFORE, premises considered, Defendants pray that the relief Plaintiffs seek be in all ways denied, that Defendants go hence with their costs without day and that Defendants receive such other and further relief, either at law or in equity, to which they may show themselves entitled.

Respectfully submitted,

W. ARTHUR COMBS
W. Arthur Combs
Of Combs & Archer

HERMAN WRIGHT
Herman Wright
Of MANDELL & WRIGHT
Of Mandell & Wright

Of Counsel
BERTRAM PERKEL
Bertram Perkel

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST LABOR ORGANIZATION
OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Case No. 23-CC-416
Date Filed October 29, 1971

1. Labor Organization Or Its Agents Against Which Charge Is Brought

a. Name See Attachment

• • •

d. Address (Street, city, State and Zip code) See Attachment

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (4)(B) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.) Since on or about October 29, 1971, and at all times thereafter, the above-named labor organizations, by their officers, agents and representatives, engaged in or induced or encouraged employees employed by Rogers Terminal and Shipping Corporation and other employers to engage in a strike or a

refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, an object thereof being to force and require Rogers Terminal and Shipping Corporation and other employers to cease doing business with Windward Shipping London Ltd., the West Gulf Maritime Association, the Port of Houston, the Navigation District of Harris County, Texas, and Cargill, Inc. and other employers engaged in interstate and foreign shipping.

* * *

8. Full Name of Party Filing Charge Windward Shipping London Limited

9. Address of Party Filing Charge (Street, city, State and Zip code) London, England

* * *

11. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

(Signature of representative or person making charge)
By BEN L. REYNOLDS
Ben L. Reynolds

(Title or office, if any) Attorney

Address Suite 3710 One Shell Plaza
Houston, Texas 77002

(Telephone number) 224-8380

(Date) Oct. 29, 1971

Willfully False Statements On This Charge Can Be Punished By Fine And Imprisonment (U. S. Code, Title 18, Section 1001)

Defendants' Answer to Plaintiffs' First Amended Petition

Case No. 23-CC-416

ATTACHMENT

1. American Radio Association, AFL-CIO
   4101 San Jacinto
   Houston, Texas
   522-2788

2. International Organization of Masters, Mates and Pilots, AFL-CIO
   412 Broadway
   Houston, Texas
   926-1805

3. National Marine Engineers Beneficial Association, AFL-CIO
   314 Broadway
   Houston, Texas
   923-9424

4. National Maritime Union of America, AFL-CIO
   7602 Navigation Blvd.
   Houston, Texas
   928-3381

5. Radio Officers Union of the United Telegraph Workers, AFL-CIO
   1346 Connecticut Avenue, N. W.
   Suite 918
   Washington, D. C. 20036
   (202) 234-5003

6. Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO
   Attn: Paul Drozak, Asst. Regional Director
   5804 Canal
   Houston, Texas 77011
   928-3207

Plaintiffs' Exhibit No. 1, Stipulation of the Parties

IN THE

DISTRICT COURT OF HARRIS COUNTY

—— JUDICIAL DISTRICT OF TEXAS

[SAME TITLES]

STIPULATION OF THE PARTIES

1.

The vessel Northwind is engaged in the business of international shipping and trades between United States ports and West African ports. It does not carry cargo between United States Ports. The SS Theomana is engaged in international shipping and trades between United States ports and various foreign ports. It does not carry cargo between United States ports. The cargo carried by such ships from American ports derives from American consignors in the various states of the United States and is shipped to the port of embarkation through the usual instrumentalities of interstate commerce. From time to time the ships above named regularly provender and bunker in United States ports.

2.

The vessel Northwind is a Liberian Flag vessel registered in Monrovia, Liberia, and is owned by Westwind Africa Line, Limited, a Liberian corporation. The SS Theomana is a Liberian Flag vessel registered in Monrovia, Liberia. The SS Theomana is owned by SPS Bulkcarriers, Inc., a Liberian corporation. The managing agent

of the SS Theomana is Windward Shipping (London) Limited, a British corporation.

3.

The SS Theomana is a bulk carrier which carries bulk cargo and general cargo. The Northwind is a dry cargo vessel which carries bulk cargo and general cargo between United States and West African ports as a member of the American West African Freight Conference, a conference of foreign and U. S. shipping companies operating pursuant to an agreement filed with and approved by the Federal Maritime Commission.

4.

Pickets began picketing the vessel Theomana on October 28, 1971, and have picketed continually since that time with four pickets along the dock and at the foot of the gangway of the vessel. Pickets began picketing the vessel Northwind on October 29, 1971, with four pickets along the dock and at the foot of the gangway. All pickets are walking a contiguous area adjacent to the vessel as a collective group, all carrying the same sign and passing out the same literature or paper. The picket sign carried by each picket has a cardboard placard reading as follows:

"ATTENTION TO THE PUBLIC

The wages and benefits paid seamen aboard the vessel THEOMANA (NORTHWIND) are substandard to those of American seamen. This results in extreme damage to our wage standards and loss of our jobs. Please do not patronize this vessel. Help the American seamen. We have no dispute with any other vessel on this site.

Plaintiffs' Exhibit No. 1, Stipulation of the Parties

American Radio Association, AFL-CIO

International Organization of Master Mates and Pilots AFL-CIO

National Marine Engineers Beneficial Association AFL-CIO

National Maritime Union of America, AFL-CIO

Radio Officers Union of the United Telegraph Workers AFL-CIO

Seafarers International Union of North America AFL-CIO"

Each picket also hands out a legal size sheet, one of which is attached as Exhibit A.

5.

The picketing has been peaceful and without violence or threat of violence.

6.

It is stipulated and agreed that true copies of the following documents will be made available and may be introduced into evidence without further proof of authenticity:

SS THEOMANA

1. Crew Roll and Articles of Agreement opened at Venice on August 23, 1971.
2. Crew list.
3. Collective Bargaining Agreement with Panhellenic Seamen's Federation.
4. Collective Bargaining Certificate with Panhellenic Seamen's Federation.
5. Indonesian Seafarers' Employment Contract.

Plaintiffs' Exhibit No. 1, Stipulation of the Parties

SS NORTHWIND

1. Crew Roll and Articles of Agreement opened at Rotterdam July 1, 1971.
2. Crew list.
3. Collective Bargaining Agreement with Panhellenic Seamen's Federation.
4. Collective Bargaining Certificate with Panhellenic's Seamen's Federation.
5. Collective Bargaining Agreement with the Sierra Leone Seamen's Union.

7.

It is stipulated that the captains and chief engineers of each ship will be made available to testify at the trial of the application for injunctive relief.

8.

It is stipulated that a charge has been filed with the National Labor Relations Board, 23rd Region, Houston, Texas, and is now pending before and being investigated by the Board, a true copy of said charge is attached hereto as Exhibit B.

9.

There is no labor dispute between the owners represented by the Captain and the crews of the vessels SS Theomana and SS Northwind or the Panhellenic Seamen's Federation or the Sierra Leone Seamen's Union who represent the crews of the SS Theomana and/or SS Northwind or on any Indonesian Seafarers' Employment Contract.

Plaintiffs' Exhibit No. 1, Stipulation of the Parties

10.

The crews and officers of the SS Theomana and the SS Northwind are foreign nationals.

11.

This stipulation is not exclusive and either party may offer evidence on any admissible subject which is not in conflict with this stipulation.

Agreed this 7th day of November, 1971.

Attorneys for Defendants
HERMAN WRIGHT
Herman Wright
Of MANDELL & WRIGHT

W. ARTHUR COMBS
W. Arthur Combs
Of COMBS & ARCHER

BERTRAM PERKEL
Bertram Perkel
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W. D. DEAKINS
W. D. Deakins
Of VINSON, ELKINS, SEARLS & SMITH

BEN L. REYNOLDS
Ben. L. Reynolds
Of ROYSTON, RAYZOR & COOK

Plaintiffs' Exhibit No. 1, Stipulation of the Parties

EXHIBIT A, ANNEXED TO STIPULATION

TO THE PUBLIC

American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

A strong American Merchant Marine is essential to our national defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.

PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.

Our dispute here is limited to the vessel picketed at this site, the SS

American Radio Association AFL-CIO

International Organization of Master Mates and Pilots AFL-CIO

National Marine Engineers Beneficial Association AFL-CIO

National Maritime Union of America AFL-CIO

Radio Officers Union of the United Telegraph Workers AFL-CIO

Seafarers International Union of North America AFL-CIO

Plaintiffs' Exhibit 18—Additional Stipulation of the Parties

IN THE

DISTRICT COURT OF HARRIS COUNTY

164TH JUDICIAL DISTRICT OF TEXAS

[SAME TITLES]

ADDITIONAL STIPULATION OF THE PARTIES

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for plaintiffs and the attorneys for defendants that if representatives of the Sierra Leone Seamen's Union and Pan Hellenic Seamen's Federation were called to testify, they would testify that they are selected by the employees working under the Sierra Leone and Pan Hellenic Seamen's agreements for the purposes of collective bargaining.

Agreed this day of November, 1971.

Attorneys for Defendants
HERMAN WRIGHT
Herman Wright
Of MANDELL & WRIGHT

W. ARTHUR COMBS
W. Arthur Combs
Of COMBS & ARCHER

BERTRAM PERKEL
Bertram Perkel

Attorneys for Plaintiffs
W. D. DEAKINS
W. D. Deakins
Of VINSON, ELKINS, SEARLS & SMITH

BEN L. REYNOLDS

Excerpts From Transcripts of Proceedings

PROCEEDINGS OF NOVEMBER 8, 1971

(14)*

* * *

Mr. Deakins: Your Honor, now I first offer a written stipulation of the parties executed yesterday in 11 numbered paragraphs, signed by attorneys

(15)

for all of the parties, dealing with the matter pertinent to the issues in this case. Does the Court want me to read these into the record, too?

The Court: Not if it's in form to be filed in the papers. I can read it myself.

Mr. Deakins: Yes, sir, it is in form.

I will now offer this as Plaintiffs' Exhibit No. 1.

The Court: Please have the reporter mark it as Plaintiffs' Exhibit No. 1.

(Plaintiffs' Exhibit No. 1 was marked.)

Mr. Perkel: No objection.

The Court: Plaintiffs' Exhibit No. 1, being a stipulation of the parties, is admitted without objection.

Mr. Deakins: Your Honor, I now ask that there be marked for the purpose of identification as Plaintiffs' Exhibit No. 2 a document on NLRB Form 601 entitled Withdrawal Request, signed in behalf of Windward Shipping London Limited by Ben Reynolds, Attorney.

Mr. Perkel: I have seen it, Your Honor. No objection.

(Plaintiffs' Exhibit No. 2 was marked.)

Mr. Deakins: I now offer Plaintiffs' Exhibit No. 2.

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* Numbers in parentheses refer to pages of the Original Record, parts 2-2C.

(16)

The Court: Do you have any objection to that, Mr. Perkel?

Mr. Perkel: No, Your Honor.

The Court: Plaintiffs' Exhibit No. 2 is admitted without objection.

Mr. Deakins: Mark this, please.

(Plaintiffs' Exhibit No. 3 was marked.)

Mr. Deakins: Your Honor, I now offer Plaintiffs' Exhibit No. 3, a letter dated November 8, 1971, to Arthur Mandell, Attorney, Mandell & Wright, and W. Arthur Combs, Combs & Archer, both of Houston, Texas, signed by Clifford W. Potter, Regional Director of the National Labor Relations Board, Region 23, Houston, Texas.

Mr. Perkel: No objection, Your Honor.

The Court: Plaintiffs' Exhibit 3 is admitted without objection.

Mr. Deakins: The additional stipulations, Your Honor, the first is as follows: Members of the defendant unions are not employees of the plaintiffs Windward Shipping London Limited or SPS Bulkcarriers Corporation, or Westwind Africa Line, Limited. The defendant unions do not represent any officer or crewman employed on any vessel of the plaintiffs.

I now offer that stipulation.

(17)

Mr. Perkel: No objection, Your Honor.

The Court: That will be received and made part of the record.

Mr. Deakins: The second proposed stipulation is as follows: A collective bargaining agreement is currently in

effect between the plaintiffs and Pan Hellenic Seamen's Federation covering crew members on both of the vessels, the Northwind and the Theomana. (1) Except in the case of the Theomana, the Indonesian members of the crew are covered by the Indonesia Seafarers' contract, which is subject to English law. (2) With respect to the Northwind, the balance of the crew, that is balance other than the Greek members of the crew, being West Africans, are covered by the Sierra Leone Seamen's Union's contract. The above unions represent the employees under the contracts concerning wages, overtime, leaves and other terms and conditions of service.

Mr. Perkel: No objection to that, Your Honor.

The Court: That stipulation will be admitted as part of the record.

Mr. Deakins: The third proposed stipulation is as follows: If the plaintiffs' representatives were called to testify, they would testify that they had

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no notice of the intention of the defendants to picket the vessels until after their arrival of the vessels at Houston, Texas, and the partial loading of the vessels had been completed.

Mr. Perkel: Your Honor, there is no objection to these so testified stipulations which we have entered into, except we have also agreed in connection with them that at some point in time they are subject to objection on the ground of relevance.

The Court: In other words, you are agreeing that the witness, if he was on the witness stand, would so testify if he were permitted to in face of your objection as to relevance.

Mr. Perkel: Yes, Your Honor.

The Court: Is that satisfactory?

Mr. Deakins: Satisfactory, Your Honor.

The Court: Then that stipulation will be made part of the record.

Mr. Deakins: The next proposed stipulation is as follows: Under Liberian law and Greek law when an employer and a labor organization have entered into a labor contract, it is unlawful for an employer to bargain with or enter into a labor contract pertaining to such seamen with any other labor organization.

Mr. Perkel: We agree to that, Your

(19)

Honor.

The Court: By agreeing to that, do you intend to waive the requirement of the Rules of Civil Procedure in Texas which requires that the statutes be set out in writing in the record before the Court can take judicial notice of it?

Mr. Perkel: Your Honor, we were shown copies of the various statutes and essentially what we are waiving here is the right to have proof of foreign law made, that I accept the copies which were shown to me and which will be submitted to this Court, I believe Sections 354 and 357 under Liberian law, and they need not be put through the burden of proving the foreign law.

The Court: Very well. That is agreeable to the Court. The stipulation will be made part of the record.

Mr. Deakins: The next proposed stipulation is as follows: The replacement value of the SS Theomana is in excess of $8,000,000. The replacement value of the SS Northwind is approximately $5,700,000.

Mr. Perkel: No objection to that, Your Honor.

The Court: The stipulation will be received.

(20)

Mr. Deakins: If representatives of the plaintiffs were called to testify, they would testify that there is no United States AID cargo or PL 480 cargo to be loaded on the SS Northwind or the SS Theomana at the City of Houston, Texas. The witnesses would further testify that the wheat cargo to be loaded on the SS Northwind has an f.o.b. value of $877,000, which is to be paid for in cash upon surrender of bills of lading.

The witness would further testify that the consignee of these wheat cargo, Flour Mills of Nigeria, Limited, has purchased, paid for in cash and shipped from the United States Gulf ports in the months of August through October, 1971, more than 126,000 long tons of wheat at an f.o.b. cost of more than $8,400,000.

Mr. Perkel: No objection, Your Honor.

The Court: That stipulation will be received.

Mr. Deakins: The next proposed stipulation is as follows, Your Honor.

The Theomana is in the chartering or tramp service and is suffering damage by reason of being picketed, which damage is incapable of reasonable calculation. The charter market fluctuates daily.

Mr. Perkel: No objection, Your Honor.

(21)

The Court: This is an incomplete stipulation, gentlemen, which I am unable to follow. You say she is in the tramp service or charter service. What is the present status of the vessel? Is it on charter or is it in the tramp service available to anybody who will hire it?

Mr. Reynolds: Right now, Your Honor, the vessel is on charter but this will be terminated shortly.

The Court: Is she chartered for the voyage that she is about to begin?

Mr. Reynolds: Yes, sir.

The Court: That is, when she leaves Houston.

Mr. Reynolds: Yes, sir.

The Court: She is certainly not available until that voyage is completed.

Mr. Reynolds: No, sir.

The Court: What relevance does the charter have, or being a tramp have if she is under charter at this time? This is a temporary injunction hearing, gentlemen. We are concerned with the status at the present time, aren't we?

Mr. Reynolds: Yes, sir, but she cannot be available. They made deals ahead of time, Judge,

(22)

for chartering, and she can't make a deal ahead of time until she clears this port.

The Court: All right.

Mr. Deakins: Completes this present charter.

The Court: All right.

Mr. Reynolds: Until she sails from this port to complete her present charter.

The Court: The Court would suggest, then, that any delay at Houston would delay the date at which she would be available for further charter. Is that what you are telling me?

Mr. Reynolds: Yes, sir.

The Court: Go ahead, please.

Mr. Deakins: The next proposal, Your Honor, is as follows: Longshoremen and members of other unions at the Port of Houston who service, work and assist the vessels have refused to perform their usual tasks rela-

tive to the vessels herein by refusing to cross the picket line established by the defendants. These union members include, but are not limited to, radar maintenance personnel and servicemen, provenders, tug operators and crews, linemen, pilots, and miscellaneous deliverymen.

Mr. Perkel: That is acceptable, Your

(23)

Honor, except to the extent that both parties are aware that with respect to pilots both situations have abided. There have been some pilots who have agreed to respect the line established by the unions and other pilots who have not. It is just that there seems to be some suggestion that this particular vessel is having some difficulty in pilots, and I don't want the stipulation to extend as a rule that all pilots are not crossing our line.

The Court: Is it necessary to your case to have pilots in this stipulation at all?

Mr. Deakins: No, Your Honor.

Mr. Reynolds: No, Your Honor.

The Court: If it would be so difficult to distinguish between those who do and those who don't, it seems to me it would be simple to leave pilots out of that stipulation completely. Would that be satisfactory?

Mr. Deakins: Correct, Your Honor. We will amend the stipulation to exclude the word "pilots."

The Court: Let the record show the stipulation is amended to exclude pilots.

As such, is it satisfactory to the defendants now, Mr. Perkel?

Mr. Perkel: Yes, Your Honor.

(24)

The Court: Go ahead, please.

Mr. Deakins: The next proposed stipulation is as follows, Your Honor: If witnesses were called on behalf of the Westwind Africa Line, Limited, to testify, they would testify that: (1) The vessel Northwind is engaged in the liner service between the United States and West African ports; (2) Prompt arrival and delivery of cargo in the liner service is of great concern to consignors and consignees of said cargo.

Mr. Perkel: That is acceptable, Your Honor.

The Court: It is agreeable to the Court.

Mr. Deakins: The next proposed stipulation is as follows, Your Honor: To the knowledge of the plaintiffs, the defendants have made no demand upon any official of the plaintiff companies by oral or written communication addressed to the plaintiff companies seeking to represent the employees of plaintiff companies working on the SS Theomana and the SS Northwind.

Mr. Perkel: That is acceptable, Your Honor.

The Court: It is acceptable to the Court.

(25)

The stipulation will be made part of the record.

Mr. Deakins: That is all.

The Court: Do the defendants have any stipulations that they have agreed upon that they would like to have in the record at this time?

Mr. Perkel: Not at this time, Your Honor.

The Court: Mr. Deakins, you may go forward with your proof on your application for temporary injunction, please.

Mr. Deakins: Call Capt. Groeneveld.

The Court: Capt. Groeneveld, will you come around, sir?

J. M. GROENEVELD, a witness called on behalf of the plaintiffs, having been first duly sworn, testified upon his oath as follows:

Direxť examination by Mr. Deakins

Q. State your full name, please, sir. A. J. M. Groeneveld.

Q. How do you spell that? A. G-r-o-e-n-e-v-e-l-d.

Q. By whom are you employed?

(26)

A. I am the port captain for Westwind Africa Line for Texan ports.

Q. Where do you live, Captain? A. In Houston.

Q. What has been your experience in the shipping business and in the operation of ships? A. I have been a ship captain. I have been sailing for 22 years.

Q. What capacities have you served on various vessels? A. As sea captain.

Q. Are you familiar with the vessel the Northwind? A. Yes.

Q. Describe that vessel. A. She is a bulkcarrier, five holds.

Q. What is the size of the vessel, generally? A. She is about 20,000 dead weight.

Q. Have you served on, or are you familiar with vessels of similar class and size? A. Yes.

Q. Have you had occasion to determine whether the Northwind had commenced to load cargo at the time when she was picketed? A. No, she never loaded anything any more after she was picketed.

Q. When did the Northwind dock in Houston?

(27)

A. Friday morning at 3:00 o'clock, or the 29th of October.

Q. What occurred after that with reference to whether or not she was loaded? A. We started working with two gangs at 7:00 o'clock in the morning.

Q. Two longshore gangs? A. Two gangs.

Q. What were you loading? A. Wheat.

Q. Where were you loading? A. At Equity Elevator.

Q. What occurred after that with reference to the loading of the vessel? A. We loaded until 12:00 o'clock, and after 12:00 o'clock the longshoremen went for lunch, and after they came back we had pickets there at the gang.

Q. Were the picketers carryings signs? A. They were carrying a sign and carrying the American flag.

Q. What occurred with reference to whether or not the longshoremen worked the vessel thereafter? A. The longshoremen didn't want to cross the picket lines.

Q. Could you tell me what the cargo was that the

(28)

Northwind was lading at that time? A. Wheat.

Q. Do you know how much had been loaded on at the time the longshoremen ceased to perform any duties? A. About 6,500 tons.

Q. How much of the vessel is loaded? A. She was supposed to load 11,400 tons.

Q. How is this loaded with reference to the various compartments of the ship? A. In three different hatches, so the vessel is unseaworthy right now.

Q. Sir? A. We loaded in three different hatches.

Q. Which hatches did you load into? A. In two, four and five.

Q. What would you have done with reference to Hatches 1 and 2 if you had continued to load as anticipated? A. You couldn't load there because we had to discharge coffee for Houston first.

Q. But you could not load them at the Equity dock? A. No.

Q. So you had loaded three hatches, is that right? A. Right.

Q. And then what occurred with reference to whether or not the vessel was moved?

(29)

A. Well, because the longshoremen didn't want to cross the picket lines, we tried to shift the vessel to City Docks 48 to discharge the coffee.

Q. Did you call for a tug to assist you in shifting? A. Yes, we called for Friday night, called pilots and tugs for 9:00 o'clock that night.

Q. And did that tug arrive? A. The tugboats arrived and the pilot arrived, but the tugboats, after they saw the sign, because the surge line of the tugboat was put on the sign, they pulled out.

Q. Did the pilot board the vessel? A. The pilot boarded the vessel, but after he heard from the tugboats that they were not going to assist the ship——

Q. Then he left? A. He left the ship.

Q. Were you subsequently able to move the vessel? A. No, not without a pilot.

Q. But did the vessel subsequently move to another dock? A. No.

Q. How about the following day? A. The following day we got a pilot and tugboats and the tugboats pulled off again, but the pilot

(30)

agreed to take the ship out with the captain without tugboats.

Q. Did you move the vessel out to the channel then? A. That's right, and then she moved to City Docks 48.

There were no pickets there so the line men and the tugboats helped the ship dock.

Q. And thereafter did picketing occur? A. Well, we had a gang of longshoremen ordered there for 7:00 o'clock, and I was talking to the walking boss of the longshoremen and he said, "Well, you are lucky that you don't have any pickets here so you can work here."

Mr. Perkel: Objection, Your Honor; hearsay objection.

The Court: The objection will be sustained. I will disregard what the man told him.

What happened?

A. After the ship docked and in a few minutes after that the pickets showed up and the longshoremen said, the walking boss said, "I am sorry, I cannot cross this picket line."

Mr. Wright: Same objection, Your Honor.

The Court: You can't tell me, Captain, what somebody said to you unless it is one of the defendants in this lawsuit or a representative of

(31)

them, but you can tell me what happened. Please do not try to tell me something somebody told you, Now go ahead and answer his question.

Q. Captain, tell me, did you observe the longshoremen down there at the picket sign? A. They were there.

Q. Did they come to the picket sign as ordered? A. They went to the picket sign.

Q. Did they come aboard and work? A. No.

Q. Did they leave after that? A. They left after they had seen the picket sign.

Q. What was the purpose of moving down there, shift-

ing down there? Was that for the purpose of unloading the coffee? A. That's right.

Q. Was the coffee unloaded? A. No, never touched.

Q. What are your duties with reference to the disposition of cargo and vessels that are being loaded? A. Well, I figure out stability for the ships and order gangs and plan the cargo on the ship.

Q. Why is that necessary? A. Well, because of the seaworthiness of the ship.

Q. Do you mean to say, then, that if the cargo isn't

(32)

properly loaded the ship isn't seaworthy? A. That's right.

Q. Now, with Hatches 3, 4 and 5 loaded with wheat—A. 2, 4 and 5.

Q. Or partially loaded, is that right? A. That's right.

Q. And Hatches 1 and 2, are they fully loaded or partially loaded with coffee? A. Partially loaded with coffee.

Q. In your opinion, is the ship seaworthy? A. No.

Q. Do you mean to say that in that connection your opinion is that that vessel could not properly sail? A. That's right, she cannot sail.

Mr. Deakins: You may cross examine.
The Court: Mr. Perkel.
Mr. Perkel: Thank you, Your Honor.

Cross examination by Mr. Perkel

Q. Captain, when did you move the vessel to another point in the harbor? A. Saturday at 5:30 from Equity, and she docked 10 minutes past 7:00.

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Q. Without tugs? A. She docked with tugs. She undocked without tugs.

Q. The vessel arrived and docked at some point? A. Right.

Q. And then subsequently you moved that vessel to another point in the harbor. The next day, was it? A. No, no.

Q. Two days later? A. No, we never moved it. You are confused now. You mean when the ship came into Houston?

Q. Yes, it came up to the dock. A. Oh, the first time.

Q. The ship came into Houston and came up to a dock? A. Right.

Q. At that point you started to unload the vessel? A. Excuse me.

Q. You started to unload the vessel? A. No, we started to load.

Q. Started to load it? A. Right.

Q. And you proceeded partially through Hatches 2, 4 and 5, is that correct? A. Right.

Q. And then while you were proceeding partially through it one day pickets appeared?

(34)

A. Yes.

Q. And the longshoremen saw the picket signs and didn't cross the lines, is that correct? A. Right.

Q. And then I thought you testified that you then moved it, your ship, to another pier? A. The next day.

Q. The next day? A. Yes.

Q. Now, you moved it with partially loaded Hatches 2, 4 and 5? A. Right.

Q. Which you testified made the ship unseaworthy, is that correct? A. Right. You don't have to be seaworthy in shore waters.

Q. Notwithstanding the fact that you determined the ship to be unseaworthy, you moved that vessel without

tugs and just a pilot to another point in the harbor, is that correct? A. Yes.

Q. Now, even at that point you testified that the pickets found you once again, is that correct? A. Right.

Q. And the longshoremen which you had ordered there

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again refused to work? A. They didn't refuse to work, they refused to cross the picket line.

Q. Did you at that time see what had happened when the longshoremen approached the picket line? A. Yes.

Q. Could you describe for us what you saw? A. Well, they picked up the pamphlets they had there on the pallet and they saw the sign and they discussed it and then they left the dock.

Q. Captain, what is your position for the Westwind in Houston? A. I am port captain for the Texan ports.

Q. Did any of the defendant unions which are picketing you make a demand upon you to represent the employees on the Westwind? A. No.

Q. I am sorry, is it the Northwind? A. It's the Northwind.

Mr. Perkel: I have no further questions, Your Honor.

* * *

(45)

RICHARD HENRIKSON, a witness called on behalf of the plaintiffs, having been first duly sworn, testified upon his oath as follows:

Direct examination by Mr. Reynolds

Q. Mr. Henrikson, would you please state your full name? A. Richard Henrikson.

Q. How are you employed, sir? A. I am superintendent of the Rogers Terminal & Shipping Corporation.

Q. What relationship does Rogers Terminal & Shipping Corporation have to the vessel Theomana? A. They are the stevedore and the vessel agent.

(46)

Q. What is your specific job down at Rogers Terminal? A. I am the stevedoring superintendent and the vessel agent.

Q. In that capacity, do you have a duty to prepare a business record called a port log and statement of facts? A. Yes, sir.

Q. Have you prepared such a record in this situation? A. Yes, sir.

Q. Do you usually do that when you have a vessel at your dock that is under charter party? A. No, I usually do that when we are the agents for the vessel that is at our dock.

Q. When you are the agent you prepare this kind of a document? A. Yes, sir.

Q. Would you refer, please, to that document if you need to.

Mr. Reynolds: We would offer into evidence at this time that document, which is Plaintiffs' Exhibits 4 and 4-A, Your Honor.

Mr. Perkel: No objection, Your Honor.

The Court: Plaintiffs' Exhibits 4 and 4-A are admitted without objection. Tell me the title of that document again, sir.

(47)

A. It's the port log and statement of facts for the Liberian motor vessel Theomana.

The Court: Now you may refer to it in answering Counsel's questions if you need to.

Q. (By Mr. Reynolds) Mr. Henrikson, when did this vessel arrive? A. This vessel arrived in Houston on the 23rd of October at 1830 hours.

Q. Give us briefly the process of loading to the time pickets were first observed. A. Sir?

Q. What loading occurred before pickets arrived? A. Well, the vessel arrived on Saturday, the 23rd; labor was ordered to commence loading the vessel on Sunday, October 24.

Mr. Perkel: Your Honor, at this point I must object. No problem with the witness using the document to refresh his recollection if he needs to, but I saw him at this point looking down and reading from it, and I wish he would be instructed.

The Court: The instrument is in evidence, is it not, Mr. Perkel?

Mr. Perkel: It is, Your Honor.

The Court: Very well. Then if it is in

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evidence, I have either got to read it or listen to what he says about it. The objection will be overruled.

If you need to read it, read it. If you can tell me from your memory, tell me from your memory.

A. Okay.

On October 23 labor was ordered to start loading the Theomana at Cargill for the following morning, 7:00 o'clock a.m. At 7:00 o'clock, Sunday, October 24, two gangs reported to the ship and we commenced loading the Theomana, and we loaded until 11:30 on the 24th.

On October 25 we ordered labor again for the morning of the 26th to resume loading, and we received two gangs on the 26th, the same as we had ordered, and we resumed loading. We loaded until 12:00 o'clock and then took a meal hour from 12:00 to 1:00, and we came back at 1:00 o'clock and we worked one gang until 4:15 and the second gang until 4:30 that afternoon.

On the 27th we ordered labor for a 7:00 o'clock start that night. We received the two gangs that we ordered, and we loaded until 11:00 o'clock that evening.

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On Thursday we were loading another vessel on the other loading berth and approximately 5:30 that night pickets representing the various maritime unions came up and set up a picket line at the gangway to the Theomana.

Q. (By Mr. Reynolds) Up to this time, approximately how much cargo had been loaded, do you know? A. Approximately 20,800 tons.

Q. Do you know how many tons you were to load totally in this vessel? A. We planned on loading 28,300 tons.

Q. Do you know how many hatches remained slack at this time? A. I believe No. 1, No. 3 and No. 6. It's a seven-hatch ship.

Q. Did the pickets remain there continually up to this time? A. Yes, sir, the pickets have been there since 5:30 on October 28.

Q. Has there been any further loading by the longshoremen? A. No, sir.

Q. Have the longshoremen refused to go aboard the vessel? A. Yes, sir. We have ordered labor at various times

(50)

between the 28th of October and the present day, and labor

has reported for work but they have refused to cross the picket line. Consequently, we could not load the vessel.

Q. Has labor advised you at any time as to why they are refusing to cross the picket line or why they are not working? A. We have ordered labor from the local. We have ordered labor from ILA Local 1273, and when we have placed the order the business agent has asked if the pickets are still up and we have advised him yes, the pickets are still up and we have not received labor.

Q. Would you look at those two photographs there, Plaintiffs' No. 5 and Plaintiffs' No. 6 Exhibits, and tell us whether or not they represent the pickets that are down there? A. This photo here is an exact reproduction of the picket signs that are on the gangway, P-6.

Mr. Combs: May we see them?

Mr. Reynolds: Surely. We haven't offered them yet, but go ahead and look at them.

Q. You have identified what has been marked as Plaintiffs' Exhibit No. 6 as a photograph of the signs that are down there?

(51)

A. Yes, sir.

Mr. Reynolds: We offer this into evidence, Your Honor, Plaintiffs' No. 6. We will wait on Plaintiffs 5. It's about the Theomana.

The Court: Plaintiffs' 6 is offered. Do you have any objection, Mr. Perkel?

Mr. Perkel: Your Honor, I have no objection to that providing it's being offered just to show the contents of the sign instead of being used to picket the vessel in question, and by all means I would agree to that.

The Court: Isn't that all it shows?

Mr. Perkel: I don't know. If that's what it's being offered for, that's fine.

The Court: For what purpose is the exhibit being offered, Mr. Reynolds?

Mr. Reynolds: To show the signs and there is a flag in the picture down there that are being used on the scene.

The Court: To show signs and there is a flag that are being used. Now, what is the purpose of the offer, please?

Mr. Reynolds: To show these items demonstratively to the Court, Your Honor.

(52)

The Court: Do you have any objection for that purpose?

Mr. Perkel: None whatsoever, Your Honor.

The Court: Plaintiffs' Exhibit 6 is admitted for the purpose offered.

May I see them, please, unless you are going to use them again?

Mr. Reynolds: No.

I will offer 5 at this time, although this witness has not identified it. It's got the other vessel's picket sign on it. I would like to get them in.

Mr. Perkel: We will agree that this is a sign picketed by the Northwind and represents a sign being carried.

Mr. Reynolds: We will offer both, Your Honor, at this time.

The Court: Plaintiffs' Exhibit No. 5 is admitted without objection.

Q. (By Mr. Reynolds) Mr. Henrikson, the port log which we have put into evidence has some detail in it with respect to when labor was called and when it did not show up, is that correct? A. Yes, sir.

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(57)

The Court: Is Mr. Henrikson back this morning, or is it necessary for him to be here?

Mr. Reynolds: Yes, we will have him back in just a moment. I think we ought to proceed with the stipulation first, Your Honor.

The Court: Very well. Go ahead.

Mr. Reynolds: I believe Mr. Deakins has the best notes for the stipulation, Your Honor.

The Court: Please dictate the stipulation to the reporter.

Mr. Deakins: I think I can do this, Your Honor.

Your Honor, the parties have met off the record and have agreed to a stipulation which I shall endeavor to state from my notes.

In connection with the Northwind, the defendants have agreed that the Northwind shall be permitted to fill the two holds that are still slack in order that the vessel will become seaworthy and that they will be permitted by the union taking down the picket line to provender, secure safety service, such bunkering and lubricants as they need.

It has been called to my attention that the stipulation with reference to the Northwind is that holds Nos. 2 and 5 will be filled in order to make the

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vessel seaworthy, and the captain has agreed that the vessel will be seaworthy in such condition.

Colloquy

In connection with the Theomana, the union has agreed that, if necessary, it will permit and abide by a survey by the National Cargo Bureau as to what the requirements are to make the vessel seaworthy, and in order to do so it will take down its picket line and the Theomana will be permitted to load such bulk cargo as is necessary to make the vessel seaworthy considering the circumstances which were detailed yesterday in connection with the condition of the vessel as it has been sitting at the pier in Houston. The National Cargo Bureau will determine what is necessary to complete the loading of the vessel so as to make it seaworthy.

(59)

The Court pointed out in a conference that we had that, of course, it was the province of the master to ascertain, regardless of what the National Cargo Bureau says, whether the vessel is seaworthy, and we will make certain that in accordance with the instruction of the Court, the master will consent to the determination of the National Cargo Bureau with reference to the seaworthiness of the vessel, the Theomana.

In that connection, the Defendants have agreed that the Theomana can provender, secure safety service and bunkering and lubricants and such other necessary services as are indicated to permit it to become seaworthy and safe.

Incidentally, it was also agreed that if the National Cargo Bureau directs, the vessel Theomana will load cargo, bulk cargo, a minimal amount, to make the vessel seaworthy.

No. 2. Representation of the Defendants will be permitted to board the vessel Theomana with the

representatives of the National Cargo Bureau when the survey is made, in order to see that the National Cargo work is properly done and nothing more.

Three. It is further stipulated that each ship intends to return to the Port of Houston at

(60)

some unspecified date in the future, or some other United States port, and that the Defendants are threatening and have threatened to picket such vessels upon their return, and that when and if such vessels return, the Defendants will picket those vessels.

Four. It is also understood and agreed and stipulated by the parties that this cause of action will be converted to and transferred to a proceeding on the merits and that, with the indulgence of the Court, the matter will be adjourned, subject to putting on two or three witnesses this morning, to be resumed at 1:30 in the afternoon on the 29th day of November, 1971, so that the hearing can then be completed without delay.

It is further stipulated by the parties that no evidence will be offered in derogation of the stipulation which we have agreed to above.

Further, it is stipulated that in the event that the Defendants voluntarily discontinue their nationwide practice of picketing of foreign flag vessels nationwide or in the Port of Houston, then this matter may be dismissed without prejudice and with each party bearing its own costs.

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Mr. Deakins: It has further been stipulated by the parties that in the event of the violation by the defendants of this agreement that the parties

plaintiff may apply to this court for temporary restraining order upon notice to local counsel for the defendants of such application and that the matter will be heard forthwith by the Court to ascertain the violation of this stipulation made in open court or not whichever the case may be.

Whether this is clear or not I don't know, but the parties are in agreement, and it is stipulated, that the pickets will be withdrawn in order that the parties will be able to comply with the foregoing stipulation and agreement.

Mr. Perkel: Your Honor, on behalf of the defendants, that is an accurate representation of the agreement of the parties, and we agree with the stipulation as stated for the record.

The Court: Very well. The stipulation is satisfactory to the Court, and it will be entered of record in this case.

* * *

(63)

Richard Henrikson, the witness on the stand at the time of adjournment, called on behalf of the defendants [sic], having been previously sworn, resumed the stand and testified further upon his oath as follows:

Cross examination—(Cont'd.) by Mr. Perkel

Q. Mr. Henrikson, did you see any of the pickets at the vessel Northwind? A. No, sir.

Q. How about at the Theomana? A. Yes, sir.

Q. Did you approach any of them at any time? A. No, sir.

Q. Were you made aware of what they were doing by others? A. I didn't talk to them. I saw them on the dock.

Q. Did you see what they were doing? A. Yes, sir. They were marching up, or they came down to the dock with their picket sign and they

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set up their picket.

Q. How many were there? A. When they came down I counted five, the day they came down, and the number has fluctuated.

Q. Were they all picketing at one time, or were two resting and two walking, or three resting? A. Well, I have seen times when there have been no pickets down there other than the picket sign.

Q. Did you notice whether they handed out any literature? A. I was handed a piece of, or one document.

Q. I would like you to look at Exhibit A next to Plaintiffs' Exhibit 1 in evidence and ask you whether this is the document that you saw? A. Yes, this is a copy of the document I have seen.

(65)

Q. Did any of the pickets ever come up and speak to you? A. Not on the dock, no. I believe one day one of the pickets didn't necessarily speak to me; I wasn't talking to him, but one of the pickets was in our office with the captain.

Q. Do you know what they were doing then? A. Pardon?

Q. Do you know what they were doing then? A. No. The captain was up trying to get onto the telephone, to talk on the telephone, and I was in my office, and I noted that one man represented himself as being one of the pickets.

Q. To your knowledge, was a demand made upon you or any other official of the company for representation

rights to these employees of yours on the Theomana? A. No, not to my knowledge.

* * *

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Mr. Reynolds: P-12 is the crew roll and articles of agreement for the vessel Northwind, which we will offer into evidence at this time.

Mr. Perkel: No objection, Your Honor.

The Court: It is admitted without objection.

(Plaintiffs' Exhibit No. 12 was admitted into evidence.)

Mr. Reynolds: P-13 is the certificate that the vessel Northwind has a collective agreement with the Pan Hellenic Seamen's Federation. We offer it into evidence at this time.

Mr. Wright: Is this one we do not have a copy of again?

Mr. Reynolds: I think I gave you a copy of it, Mr. Wright. It's a very small piece of paper. This is the original of it.

Mr. Perkel: It's in here.

Mr. Wright: I am sorry.

Mr. Perkel: No objection, Your Honor.

The Court: It is admitted without objection.

(Plaintiffs' Exhibit No. 13 was admitted into evidence.)

Mr. Reynolds: P-14 is the crew list of

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the vessel Northwind, which we offer into evidence at this time.

Mr. Perkel: No objection.

The Court: It is admitted without objection.

(Plaintiffs' Exhibit No. 14 was admitted into evidence.)

* * *

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Mr. Perkel: Let me have these marked.

(Defendants' Exhibits Nos. 1 through 7, inclusive, were marked.)

Mr. Perkel: Your Honor, if I may, I will describe them for you.

Defendants' 1 is the collective bargaining agreement between various companies and the National Maritime Union.

Defendants' 2 is the collective bargaining agreement between various contracted companies and the American Radio Association.

Defendants' 3 is a collective bargaining agreement between various contracting companies and the Radio Officers Union.

Defendants' 4 is a collective bargaining agreement between various contracting companies and the American Radio Association.

Defendants' 5 is a collective bargaining agreement between the——

The Court: Excuse me a minute, Counsel. It seems to me that you have two of the same union. D-2 is an agreement with the American Radio Association.

Mr. Perkel: I'm sorry, Your Honor. There are two of the same agreement, except one covers dry cargo and passenger vessels—that is D-2.

(109)

The Court: D-2 is dry cargo?

Mr. Perkel: Yes. And D-4 is East Coast Tanker Companies.

The Court: East Coast Tanker Companies?

Mr. Perkel: Correct, Your Honor.

D-5 is the dry cargo agreement between various companies and District 1, Marine Engineers Beneficial Association.

D-6 is the standard freight ship agreement between Seafarers International Union and various contracted companies.

D-7 is a report of the United States Department of Commerce, Maritime Administration, entitled "Marad 1970. Year of Transition."

At this point I will offer them as evidence, Your Honor, in this proceeding, subject, as I understand it, at least as to D-7, at such time as it is raised in this proceeding, to a motion to strike on the grounds that it is not relevant to this proceeding.

Mr. Deakins: Your Honor, we haven't had an opportunity to look at these. We were just handed them.

If the Court please, we will agree to the stipulation that we can raise the question of

(110)

relevancy or any other pertinent objection to these documents possibly in the morning.

The Court: Very well. Counsel will be given an opportunity to examine them, and the Court will reserve the ruling on the admissibility until after counsel has had that opportunity.

* * *

(111)

BERTRAM GOTTLIEB, called as a witness by the defendants, having been first duly sworn, testified upon his oath as follows:

Examination by Mr. Perkel

Q. Mr. Gottlieb, what is the position you presently hold? A. I am the director of research in the Transportation Institute in Washington.

Q. Would you tell us what the Transportation Institute is? A. Yes. It's a non-profit foundation which is dedicated primarily to research and educational activities designed to further the interests of the American flag merchant marine.

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Q. Do you have stockholders or a board of directors or board of trustees? A. We have a board of trustees, which is composed of officers of some of the major shipping companies.

Q. Could you tell us who they are? A. The chairman is Mr. Archibald E. King, who was formerly Chairman of the Board of Isthmian Lines, Inc.

The rest of the board is made up of Mr. Edward P. Walsh, president of Waterman Steamship; Mr. Michael McEvoy, who is president of Sea-Land Service, Inc.; Mr. Ran Hettena, senior vice president of Maritime Overseas Corp.; Mr. Thomas E. Stakem. senior vice president of Delta Steamship Lines, Inc.; Mr. Michael G. Mitchell, treasurer of Penn Shipping Company; Mr. Joseph Kahn, who is president of Transeastern Associates; Mr. David D. C. MacKenzie, commercial manager, Victory Carriers, Inc.; Mr. Fred S. Sherman is president of Calmar Steamship

Company; Mr. Henry Dowd is vice president of Marine Carriers, Inc.; and Mr. Michael Klebanoff, president of Ogden Marine, Inc.

Q. What are your specific duties there, Mr. Gottlieb? What do you address yourself to?

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A. Almost anything that involves the American Merchant Marine and its interplay with other forms of transportation. For example, right now we are working on a project which involves looking at a total transportation system for the United States, seeing how the merchant marine and the inland water transportation would fit into a total transportation network.

Q. Mr. Gottlieb, how long have you been with the Transportation Institute? A. A little over three and a half years.

Q. Could you give us a resume of your qualifications and your experience prior to that time? A. Well, my education, I have a Bachelor's and a Master's degree in economics from the Illinois Institute of Technology. I have done additional graduate work at the University of Wisconsin. I have taught at the University of Wisconsin, the University of Connecticut, the University of Iowa, and Illinois Institute of Technology.

Q. What did you teach, Mr. Gottlieb? A. Oh, various economic subjects and industrial engineering subjects. My latest teaching was a year as a visiting professor at the University of Iowa, in the college of business administration,

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where I taught a course in wage and salary administration.

Q. Mr. Gottlieb, could you trace for us the history of

the American Merchant Marine from 1951 through 1971 in terms of the number of ships sailing, the number of jobs available on those ships?

Mr. Deakins: Your Honor, I object to any further questions of this witness in this vein because it's immaterial to the issue in these proceedings. This is obviously a witness who is employed by an institute who are competitors, and they have not intervened in these proceedings, and this is testimony that's immaterial to any issue here, as we see it.

Mr. Perkel: Your Honor, the sole issue before the Court is the picketing of foreign flag vessels which has been engaged in by my clients, and my clients' admitted purpose is directed to saving their jobs and protecting their work standards. I couldn't conceive of anything more relevant to this proceeding than the truth of that position my clients have taken.

The Court: The relevancy may exist in this proceeding, Mr. Perkel, but I don't think you have qualified this witness yet as an expert in

(115)

the field about which you have asked the question. I would have to sustain the objection.

Mr. Perkel: On that ground?

The Court: On that ground.

Q. (By Mr. Perkel) Mr. Gottlieb, with respect to the maritime field, can you give us your involvement in it, your work in it, anything you presented in the way of testimony to various congressional committees on this score, preparation of other materials which would lend to this Court some advice as to your qualifications to testify

about the maritime industry? A. Well, as I indicated, I have been in charge of this rather large research department for over three and a half years. We have approximately eleven researchers who have anywhere from Bachelor's to Ph.D. degrees in economics and allied fields.

We conduct extensive research in all phases of the American Merchant Marine. We prepare testimony for officers of these companies when they testify before congressional committees. We prepared extensive testimony for hearings on the Merchant Marine Act of 1970.

Many of the statistics and much of the material that was used by people who testified

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for both labor and management at those hearings were material put together by my staff and myself.

I work very closely with members of the maritime administration on joint projects involving research into the merchant marine. In fact, right now my computer has statistics in it which are furnished to us directly by the maritime administration for use in this research.

I supervise the installation and operation of that computer.

Q. You don't mean physically? You mean the data in that computer? A. That's right. Physically I am not a computer technician.

Q. Within that framework, Mr. Gottlieb, and within the experience and information you have been compiling for these years, could you tell us what you have learned with respect to the number of vessels which were sailing in the American Merchant Marine for the period 1951 through 1971?

Mr. Deakins: I object to that as immaterial to these proceedings, Your Honor. It's apparent that

this witness is about to testify in this case concerning the American Merchant Marine and the effect of foreign shipping on the

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American Merchant Marine, but the Supreme Court of the United States has said that these matters should be directed to Congress and not the courts.

The Court: Are you asking for equitable relief in this proceeding?

Mr. Deakins: Yes, sir.

The Court: The objection is overruled.

You may answer the question if you can, Mr. Gottlieb.

A. Yes, sir. In 1951 the United States privately operated flag fleet, ships of 1,000 gross tons or over, was composed of 1262 ships. There was a gradual decline over the years until at the present time we have approximately 630 ships under the American flag.

(118)

Q. Mr. Gottlieb, you are making reference to some figures which you have on your lap? A. Yes.

Q. Could you tell us what those figures are and where they were compiled from? A. Most of the figures that I have are taken from various publications of the maritime administration, the Department of Commerce, or other governmental reporting agencies. The figures that I just gave you come from the maritime administration.

Q. So as I understand your testimony at this point, that from 1951 to date there have been a loss of approximately how many ships? A. Net loss of better than 600 ships.

Q. What does that mean in terms of jobs for the American merchant seaman? A. At the end of 1951 there were

a total number of ship board jobs of slightly better than 93,000. This was on all American flag ships, passenger, passenger combination, cargo, tankers.

At the present time there is approximately 30,000 jobs on American ships.

Now, in terms of employment this breaks down, since for each job there has to be more than

(119)

one person since every seafarer spends some time in shore, we can estimate that in 1951 with 93,000 plus jobs there probably were about somewhere up to about 150,000 seamen getting employment from these ships. Today we can figure maybe about 45,000.

Q. Why are there more seamen than there are jobs? A. Well, a seafaring job is not like a shoreside job where a man goes to work from 9:00 to 5:00, or whatever hours, and takes two days off. The seafarer takes a voyage. When he returns from that voyage, he may stay ashore for a while, while that ship leaves, and someone else gets aboard that ship and takes the job that he previously had on that ship. He may do that for vacation purposes, or just to stay ashore for a while for personal reasons, et cetera.

Q. Mr. Gottlieb, do you have any information for us with respect to the amount of cargo which comes into the United States which is carried aboard American bottoms, in and out of the United States? A. Yes. In 1951 we had our total ocean, United States ocean borne trade was 166,293,000 long tons. Of that amount United States flag ships carried better than 71,000,000 long tons, or

(120)

close to 43 per cent.

Today, I shouldn't say today, in 1971, which is the latest figures I have, the ocean borne commerce rose from the 166,000,000 to over 472,000,000. In fact, better than 472 and a half million, an increase of about two times, or the 472 is three times larger.

The amount carried on U. S. flag ships was only about 35 per cent of what it was in 1951.

In other words, it's declined to about twenty-six and a half million. It went from almost 43 per cent of the United States ocean borne trade in 1971, [sic] down to about five per cent at the present time.

(121)

Q. So you are talking about 38 percentage points on the entire 100 per cent, that's a percentage of what was carried by American cargo? A. I am sorry. I didn't get that, Mr. Perkel.

Q. The decline that you mentioned, a 38 per cent decline. You are talking about a decline from 43 per cent of cargo to five per cent of cargo? A. Did I say a 38 per cent decline?

Q. I thought you did. A. I believe I said it was about, that the amount of cargo carried today was about one-third of what it was in 1951, even though the total U. S. commerce is about three times as much.

Q. In the course of your employment with the Transportation Institute as research director, have you had occasion to inquire into the various possible causes for this decline, both in ships and in cargo which you described to us? A. Yes, sir.

Mr. Deakins: I object to this. It calls for speculative evidence.

The Court: The objection is overruled. Don't tell us what you speculate, just tell us what you

know. The question was, have you had occasion to inquire into this problem? Have you?

(122)

A. Yes, sir, I have.

The Court: All right, ask your next question.

Q. Have you formed any conclusions with respect to, or have any opinions with respect to any of the various causes for the decline that you described in the American Merchant Marine? A. Yes, sir, I do.

Q. Would you tell us what your opinions are?

Mr. Deakins: That is objected to, Your Honor. It's not a question that requires the testimony of an expert. It's a question that should be answered on fact.

The Court: It may be a fact that could be a matter of opinion. The objection will be overruled. You will have an opportunity, of course, to cross examine this witness on what basis he bases his conclusion.

You may express your opinion, Mr. Gottlieb.

A. Thank you, sir.

Well, there are a variety of reasons for the decline in the carriage of cargo on U. S. flag vessels during this period.

First and foremost is the fact that it costs more to operate a U. S. flag vessel than it

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does a foreign vessel. As a result, the United States flag ship operator must charge more for his services, or make

less of a profit for his services than the other operators, and as a result it's harder for him to get cargo to carry on those vessels.

The costs for operating an American flag ship might be two or three times the costs for operating a ship under a foreign flag. In order for a ship to be operated under the American flag, it normally has to be built in an American shipyard, costs about twice as much to build a comparable ship in an American shipyard versus a foreign yard. Therefore, the allocation of that capital cost to operating cost is greater.

The cost for crew costs can be as much as four times higher for an American vessel than for a foreign vessel. Insurance costs, cost of operating an office in the U. S. versus a foreign country. All of these costs are higher. Maintenance costs are higher in the United States, repair costs, than they are in foreign countries.

Q. What is the result of these higher costs on the ability of American ships to get cargo, if you have an opinion on that subject?

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A. Well, you have to really break it up into two types of ships, Mr. Perkel. The liners and the non-liner cargo. The United States flag fleet non-liner carries practically no foreign commerce of the United States other than that which is government generated cargo. In other words, it is unable to compete at all in the open market for commerce for cargo.

As far as the liners are concerned, most of the liners operate under what are called conference rates, which are set for all of the companies that belong to the conference and operate on that particular trade route. The conference rate is normally set at a figure that repre-

sents the marginal figure for the U. S. operator since he is the highest cost operator in the conference.

As a result, if any unusual costs come about, if a liner, U. S. liner operator runs into any kinds of difficulties, he is likely to be operating at a loss in a conference where almost every other operator is operating at a profit.

Another problem, of course, is the shippers' freight forwarders, who generally are given the job by the people who have the goods to

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ship of shipping, of arranging for the shipping.

One of the costs involved, of course, is in the commissions paid to the shippers, and we know as a fact that foreign shipping companies have given larger commissions to these freight forwarders to get them to ship on foreign lines. The American line can't compete with these sometimes two or three times commissions because they don't have that much of a profit margin to work with.

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Q. Mr. Gottlieb, what is the average age of the American flag vessel? A. At the present time?

Q. At the present time. A. The latest figures I have, Mr. Perkel, are for 1968.

Q. Where are those figures from? A. Those are from a statistical analysis prepared by the maritime administration for the years 1956 to 1968 for the United States flag fleet and the world merchant fleet.

We show that in 1968 the United States flag fleet had an average of nineteen years, whereas the world merchant fleet had an average age of thirteen years.

Q. Is there any trend in there with respect to the age of the American flag vessels? A. Well, from 1956 there has been a trend upward for the United States flag fleet from 11.8 average years in 1956 to 19 years in 1968, while the reverse trend exists for the world fleet, where it was 14.7 in 1956 and was 13 in 1968.

Q. Do those figures indicate anything with respect to ship construction? A. Well, the United States has lagged far behind the

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rest of the world in ship construction ever since World War II. I believe right now we have, I think, seventeen ships being constructed in this country for the merchant fleet as against over 400 in the rest of the world.

Q. In your opinion, Mr. Gottlieb, is there anything wrong with the American Merchant Marine that a little cargo wouldn't cure? A. Not a little cargo.

Mr. Deakins: I object, Your Honor.
The Court: The objection is sustained.
Mr. Perkel: I have no further questions.
The Court: You may cross examine, Mr. Deakins.

Examination by Mr. Deakins

Q. Mr. Gottlieb, your association is made up of competitors of the foreign flag ships, is it not? A. Yes, sir.

Q. Tell me this, why did you pick the year 1951 as the beginning year of your analysis on the number of jobs, for example, that were available then as compared to 1971? A. I did it quite simply for this reason, sir. Right

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after World War II we were in quite a state of flux in

the American Merchant Marine. We ended World War II with about the only really major merchant fleet. The Ship Sales Act of 1946 enabled many foreign operators to purchase ships at a very low cents on the dollar from the United States, and it was a tremendous period of flux in there which I felt would not be a representative period to use. If we went back to, for example, the end of World War II, the comparison would have been even greater, but I didn't feel that that was an appropriate period to use.

Q. But if you had gone ahead of World War II, it would have been not so great, isn't that right? A. Prior to World War II, sir, for about ten years or so before World War II, the United States, I don't recall the number of ships we had, we had quite a few, we were carrying about, I would say in a ten-year period prior to World War II, we averaged slightly better than thirty percent of our ocean borne commerce on ships of the United States.

Q. Do you know of any U. S. liner company which does not receive a United States subsidy payment in order to engage in foreign commerce at a profit?

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A. Well, I can't answer your question the way you phrased it. I can tell you up until very recently, for example, Waterman Steamship Company did not receive any subsidy from the United States. They just were approved for subsidy in the last few months. But in terms of the last part of your statement, I don't know whether that lets them engage at a profit or not.

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Q. You are familiar in your studies, the transportation

field, with the operating differential subsidy that is made available upon application by American flag vessels that is provided in 46 U. S. Code Section 1171; are you familiar with that? A. Yes, sir.

Q. Now, isn't it a fact that most of the American shippers take advantage of that provision? A. No, sir.

Q. How many don't? A. Oh, I couldn't give you a figure offhand, but I know the majority of the American companies do not. Up until the passage of this Act there were only fourteen companies in the United States that received operating differential subsidies.

Q. How did you ascertain this fact? Did you examine the applications? A. Every issue of the annual report of the maritime administration has a list of the names of the companies that receive both construction differential subsidy and operating differential subsidy with the gross amount in subsidy paid to each one of those companies for that year. That's where I got that from.

Q. Who publishes this?

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A. The Department of Commerce, maritime administration.

Q. Now, your conclusion as to the loss of carriage of cargo by U. S. vessels was, in one phrase, it cost more to operate American vessels, isn't that correct? A. That's part of the problem, yes, sir.

Q. What is the rest of the problem? A. Well, many of the foreign flag ships receive favored treatment from their governments. If you operate a ship under Liberian flag, for example, you don't pay the same amount of taxes, you don't have the same safety requirements, you don't have many of the restrictions that you have if you operate under the American flag. That's obviously one reason why Liberia has the largest merchant fleet in the world.

Q. And you said also the cost of construction in the American shipyards was higher? A. Yes, sir.

Q. Crew costs were four times as high? A. I said it could be as much as that, yes, sir.

Q. And the maintenance costs, of course, are very high compared to Liberian vessels? A. I don't believe I used the word very high. I

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believe I said it was higher.

Q. It's higher? A. Yes, sir.

Q. Would it be as much as four times as high? A. Maintenance costs?

Q. Yes, sir. A. Probably not.

Q. But considerably higher? A. It would be higher.

Q. You said there were freight forwarders costs that were also entailed? A. Yes, sir.

Q. Do you know whether there is such a cost that inures to a Liberian flag vessel of your own knowledge? A. Liberian flag vessel might pay more to the freight forwarder than an American because he has enough of a profit margin that he can afford to essentially entice the American forwarder to ship on an American ship by giving him a large——

Mr. Deakins: I move to strike this answer as nonresponsive and a voluntary statement, Your Honor.

The Court: I will disregard that part that was nonresponsive.

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Q. (By Mr. Deakins) And the insurance costs, I believe you said, were higher for American flag vessels? A. Yes.

Q. Now, many of these items of cost are in nowise caused by act of Liberia or Panama or any state where

there is foreign flag registry; isn't that correct? A. I don't believe I understand your question.

Q. These are costs attendant to doing business in the United States not caused by any foreign government; isn't that correct? A. No. I indicated that there were certain things that foreign governments do——

Q. I'm talking about the costs of insurance. Let's take these instead of broad— A. Yes, sir. Some countries actually give to their ship operators favored treatment in many of these areas.

Q. Yes, sir, you said that, but the fact that it costs more in the United States isn't brought about by any act on the part of these foreign countries, is it? A. Well, if something costs more, I mean, something else costs less, and the something else that costs less can be brought about by acts of foreign

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governments, yes, sir. For example——

Q. Yes, but something that costs more is what I asked you about, not something that costs less.

Mr. Perkel: We are kind of arguing with the witness, Your Honor. If something cost more, I assume something costs less. Perhaps if we start all over again, we can find out what he is arguing about.

The Court: Do you object to the question?

Mr. Perkel: Yes, Your Honor.

The Court: The objection is sustained.

Q. (By Mr. Deakins) Now, who fixes the rates in these conference rates? A. The conference.

Q. The conference does? A. Yes.

Q. Who makes up this conference? A. The ship owners on the particular trade route who choose to belong to the conference.

Q. Are these American flag owners or foreign flag owners or a mixture? A. A mixture.

Q. And they do this by agreement among themselves, is that right?

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A. Yes, sir. Normally the American flag owner is well out voted on these conferences, however.

Q. You stated that you know as a fact that American flag companies pay higher commissions to the freight forwarders, is that right? A. Yes, sir.

Q. Do you know that it's against the United States Shipping Act for a foreign flag company to offer higher commissions than United States companies can offer under the conference agreements? A. No, sir. I am not familiar with that law, but I can tell you that in a letter to Chairman Garmetz of the House Merchant Marine and Fisheries Committee—I am sorry. I don't have that copy with me, but I can secure a copy for the Court—the Chairman of the Freight Forwarders Association made that statement, sir.

Q. Does your association advocate that foreign flag shipping in the United States be completely interrupted and stopped? A. No, sir.

Q. Are you familiar with the fact that the Supreme Court has told the American unions that——

Mr. Perkel: Objection, Your Honor. I don't think we have to go any further.

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The Court: Let him finish his question, please.

Q. (By Mr. Deakins)—that the interference in international relations is a matter that should be addressed to the Congress rather than to the courts or any other body that has jurisdiction of that type.

Mr. Perkel: Objection, Your Honor.

The Court: The objection is sustained.

Q. (By Mr. Deakins) Do you know whether Delta receives a U. S. subsidy or not? A. I believe it does on part of its operations, sir.

Q. Do you know whether or not Westwind African Lines is one of the companies in competition with Delta? A. What?

Q. Westwind African Lines. A. No, I don't.

Q. Do you know whether Delta Lines is a member of the American-West Africa Freight Conference? A. No, I do not know that.

Mr. Deakins: That's all.

The Court: Are there any further questions, Mr. Perkel?

Mr. Perkel: No further questions, Your Honor.

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The Court: May he be excused now?

Mr. Perkel: Unless counsel wishes to call him back. I would like to get him back to Washington, as he has expressed a desire to do.

The Court: May he be excused?

Mr. Deakins: He may be excused.

The Court: Thank you very much, Mr. Gottlieb. You are excused.

(Witness excused.)

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The Court: Call your next witness, Mr. Perkel.

Mr. Perkel: I would like to call Mr. George McCartney.

GEORGE P. MCCARTNEY, was called as a witness by the defendants and, having been first duly sworn, testified upon his oath as follows:

Examination by Mr. Perkel

Q. Mr. McCartney, could you tell the Court, please, what your present position is and who you work for? A. I am a representative of the Seafarers International Union of North America at headquarters, which is located in Brooklyn, New York.

My functions are as a waterfront patrolman representing the unlicensed crews aboard our contracted vessels. I also serve in the capacity of a headquarter's representative, handling various grievances and disputes, et cetera, which come up in the course of the operation of our vessels.

Q. Did you represent the Seafarers International

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Union as their representative to a meeting of the deep sea unions for want of a better term at this point, at a meeting held on October 27, 1971? A. Yes, I did.

Q. Could you tell us who was at that meeting or the unions that were represented officially at that meeting? A. All of the American seagoing unions were represented.

The International Organization of Masters, Mates and Pilots was represented by their vice president, Captain Bob Lowen, and Captain Joseph Gaier.

The American Engineers Beneficial Association was represented by Jesse Calhoon, president of District 1, and Ray McKay, president of District 2 of the MEBA.

The American Radio Association was represented by Harvey Strickhartz.

The Radio Officers Union was represented by Edward Fitzgerald.

The Staff Officers Association was represented by Paul Tonnarelli.

The unlicensed unions present, the National Maritime Union was represented by Mel Barisic, vice president.

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The SIU was represented by Joseph DiGiorgio, a vice president of the SIU, and myself.

Q. Were there also counsel present? A. Yes. Counsel from the various seagoing unions were present: From the NMU, from the SIU, from the Masters, Mates and Pilots, from the Marine Engineers, from the ARA and the SIU also.

Q. Now, Mr. McCartney, could you tell us, to the best of your knowledge, who called the meeting and what happened at that meeting?

> Mr. Deakins: Now, Your Honor, I object to this as a compound question, becauseI intend to object to the second question.
>
> The Court: The objection is sustained. Ask him one at a time, Mr. Perkel, please.

Q. (By Mr. Perkel) Mr. McCartney, could you tell us who called the meeting? A. Jesse Calhoon called the meeting.

Q. Were you in attendance through the entire meeting? A. Yes, I was.

Q. Would you please tell us what happened at that meeting?

Mr. Deakins: I object to the question, Your Honor, because it calls for a hearsay answer and it's self-serving and is not material to these

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issues.

The Court: I will have to take that objection under advisement until I hear the answer so that I may know whether what happened is relevant to this lawsuit. I don't know whether they voted to picket there or not. If they did, it's probably relevant.

Mr. Deakins: Your Honor, there is no showing that this was made in the presence of any of the people in this case who are on the plaintiffs' side, and for that reason I object to it as hearsay and self-serving.

The Court: Aren't you suing every one of the unions that was represented at this meeting?

Mr. Deakins: Yes, sir, I think so.

The Court: Aren't you alleging that they are damaging your clients by some action they are taking?

Mr. Deakins: That's right, Your Honor.

The Court: Wouldn't you be interested in knowing what the origination of that action was, if this was the origination?

Mr. Deakins: We have been furnished with minutes of this meeting.

The Court: I will take the objection

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along. If it appears to be irrelevant, I will disregard it, but I can't tell until I hear what he says.

Mr. Deakins: Thank you, Your Honor.

The Witness: May I answer the question, Your Honor?

The Court: Yes, you may answer the question.

A. The reason for the meeting was to attempt to take some measures to correct a desperate situation.

The American Merchant Marine jobwise is in desperate, crucial trouble at the present time, and the purpose of the meeting was to discuss what lawful steps could be taken to protect the jobs of American seamen.

What was discussed at the meeting was what could be done to correct these problems. We discussed what we thought had caused the loss in jobs, which has been a terrible loss in recent years. We have lost approximately fifty percent of our jobs in the last couple of years. We are down to carrying about five percent of our foreign commerce.

It was pointed out and opinions were expressed by various of the representatives present

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of these seagoing unions that this could be traced to the competition of foreign flag vessels, the substandard wages and conditions of these vessels, in direct competition with the American Merchant Marine; and it was felt and it was concluded that the best possible course of action for us to follow was publicity picketing to call this to the attention of the American public, to request their support and cooperation, to ask them to patronize American ships and, in conjunction with this, to assist the American seaman.

This was pretty much what was discussed at the meeting.

The Court: Do you still want to object to the question, Mr. Deakins?

Mr. Deakins: I couldn't hear you, Your Honor.

The Court: Do you still want to object to the question?

Mr. Deakins: I object to this. He gave a conclusion that it was substandard wages, and he is speaking about a matter that has been the subject of some minutes. If he wants to offer the minutes, then I have no objection.

The Court: Well, my understanding was

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the question was, What happened at that meeting?

Mr. Deakins: That's right.

The Court: I am not taking any statement he makes for the truth of the matters stated; just that it was made.

The objection will be overruled and the testimony will be admitted for such weight as the Court will give it.

Mr. Perkel: Would you mark this for identification, please?

(An instrument was marked for identification as Defendants' Exhibit 8.)

Q. (By Mr. Perkel) Mr. McCartney, I show you Defendants' Exhibit 8 for identification and ask you to peruse it for a moment.

(Short delay.)

Q. Mr. McCartney, do you know what those papers are that I just handed you? A. Yes. These are the minutes of the meeting held on October 27th at the office of the MEBA in New York City, and in perusing it, it is a true

and authentic and accurate description of what was said and what transpired at the meeting.

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Q. Now, Mr. McCartney, here are three attachments to the document which you described as minutes.

Are you familiar with those as well? A. Yes, I am.

Q. Could you merely identify for us what the first one is? A. The first one is the picket sign which was used—

Q. What is the second one? A. The leaflet to the public which was distributed——

Q. And the third one? A. The third one is the instructions to the seagoing unions participating in this publicity picketing.

Mr. Perkel: Your Honor, I would now offer this exhibit in evidence as Defendants' Exhibit 8.

Mr. Deakins: Your Honor, I object to Defendants' Exhibit 8 because it's hearsay, self-serving and has no materiality to these proceedings.

The Court: For what purpose is it offered, Mr. Perkel?

Mr. Perkel: Your Honor, some point has been raised in here by Counsel for the other side and, if I recall their brief, it dwelt somewhat on it, and the relevance escaped me in their brief, but they raised it, with respect to our motives.

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I think they are well aware that unless our motives are somewhat brought under the province of the Incres, McCullouch and Benz decisions, unless they can show a motive to organize, then they will have a problem with those opinions.

Now Your Honor, since they have raised the

question of our motive, alleging that it is to go in and do something and interfere with the internal operation of their vessels, as a matter of defense it is clearly relevant to this proceeding that our motive is, as has always been stated, that we want to get Americans to literally boycott that ship, do not patronize, which motive we admit to be ours.

Now, that is an issue in here which has been raised apparently by counsel, and I don't understand it since I said this. I thought they had stipulated it away until I read their brief again.

The Court: Do you want to be heard on this, Mr. Deakins, as to motive?

Mr. Deakins: Your Honor, the motive is determined from all the facts, but not by self-serving statements that are made and hearsay statements that are written and made out of the

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presence of the plaintiffs here. I don't see how this could be material, because even though they are certified by someone who was there, that doesn't necessarily mean that they are admissible against us, because they are clearly hearsay.

Motive, I think, is a matter that has to be determined by the Court from all the evidence and not from hearsay evidence. Picket signs, for one thing.

The Court: I take it, then, from your statement, Mr. Perkel, that this exhibit is not offered for the truth of any matters stated therein, but simply as a record of what was done at the meeting on October 27th?

Mr. Perkel: That is correct, Your Honor.

The Court: Do you have objection to it being admitted for that purpose?

Mr. Deakins: Yes, sir. I think it's hearsay.

The Court: Well, it's obviously hearsay. There isn't any question about it.

It's not offered for the truth of the matters stated therein, but only offered to show that this came out of that meeting.

Mr. Deakins: Well, it has no value if

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it is hearsay and not offered for the truth of what it was, what it purports to be. It can't have any probative value.

The Court: I will admit it for the purpose of showing that this was the product of a meeting of a group of people in New York on October 27th, without being proof of the truth of any matters stated therein.

Q. (By Mr. Perkel) Mr. McCartney, as a result of that meeting did you then communicate—when I say you, I mean you personally—with any other outports of the SIU, advising them of the prospective activity, and, if so, would you tell us whom you communicated with and what you told them? Not what they told you; just what you told them. A. Yes. I communicated with our representatives in the Port of New Orleans and the Port of Mobile. I went to both of these ports, bringing a supply of picket signs, the leaflets to be distributed to the public and the instructions to the participating unions.

Q. Now, do you know of your own knowledge whether anyone else went out to other ports? A. Yes, I do.

Q. Now, could you tell us again of your knowledge

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whether the instructions that they went out with were

precisely the same instructions that you went out with? A. They were exactly the same, and the two representatives——

Q. Now, could you tell me what your instructions were? A. My instructions were to bring the materials, the picket signs and the leaflets and the detailed instructions, to the participating unions, to the Port of New Orleans, where a meeting was called of all the American seagoing unions, which meeting took place.

I explaned in detail to the representatives again of all the American seagoing unions in the Port of New Orleans and also in the Port of Mobile, Alabama, giving them a supply of picket signs, leaflets and the detailed instructions.

In addition to my going to New Orleans and Mobile, Joseph DiGiorgio of the SIU and Leon Shapiro of District 1 of the MEBA went to the Port of Houston, where they also held a similar type meeting with the representatives of the various American, of the various seagoing, American seagoing, unions in this port here. I believe from Houston they proceeded to the West Coast, where

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they held similar meetings in the Ports of Seattle, the Los Angeles area, comprising San Pedro and Long Beach and Wilmington, and San Francisco.

Mr. Perkel: I have no further questions.
The Court: You may cross examine.

Examination by Mr. Deakins

Q. Mr. McCartney, in Defendants' Exhibit 8 there is a reference made to substandard wages.

Does that mean wages that are substandard in Liberia or in the United States? A. I'm not sure that I quite understand your question, sir. Are you saying American seamen as compared to the seamen employed aboard a Liberian vessel?

Q. Yes. A. Well, I don't think there is any question that the wages, working conditions, the safety conditions existing aboard the Panamanian, Honduran vessels are substandard to those negotiated by the various American seagoing unions.

Q. Well, you are talking, then, about their being substandard in comparison with American wages, for example?

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A. Yes, sir.

Q. Now, does your— A. Well, so I can be as clear as I possibly can, they are less in every sense.

Q. Yes. That's what I asked you. A. Actually speaking.

Q. You have answered that. A. The base wages of an AB on board a Liberian flag vessel as compared to an able-bodied seaman aboard an American flag vessel, it was testified to before that it's approximately four times less. I think this would be an accurate description.

Q. Do you know exactly what the wage of a seaman on a Liberian vessel is, an ordinary seaman? A. No, I couldn't say exactly. I could give you——

Q. That's all right, then. Thank you.

Now, does your committee mean to keep the foreign flag fleet completely away from American shores forever? A. No, definitely not.

Q. Well, what do they want? What do they want the foreign flag people to do? To pay the same wages as

American vessels and maintain the same working conditions as the people in the American fleet do? A. Not necessarily.

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Q. What do they want? A. What we want is to obtain more cargo for American flag vessels. To give you an example——

Q. Well, I don't need another speech. You said you wanted to get more cargo for American vessels.

Now, how do you propose to get more cargo? By causing the foreign flag operating costs to be increased? A. Again, I have to say not necessarily. We hope to accomplish this——

Q. Well, how do you propose to do it, then? A. We hope to accomplish this by enlisting the support, the patronage of the American public. That is the purpose of our picket lines, our publicity picketing, to gain their support, their patronage of American ships. We have a committee in Washington which is definitely designed to promote American cargo.

Q. All right. Now, you have worked around the waterfront for a long time, haven't you? A. Well, I sailed for 12 years——

Q. Right. A. —in the engine department as a fireman and water tender, oiler, electrician; and I have been an elected official of the union for the last 10 years.

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I have been going to sea and I have been a representative of American seamen all of my life.

Q. And you know as a fact that longshoremen and other maritime unions won't cross picket lines? A. No, I don't know that to be a fact.

Q. You don't know that to be a fact? A. We had hoped for their cooperation, but as to whether it would be a definite fact, no, I can't say that that would be true. We certainly had hoped that they would respect and support our picket lines.

Q. Does your union cross picket lines? A. We try not to.

Q. Well, do they? Have you ever crossed a picket line? A. Personally I have never crossed the picket line, no.

Q. Have you ever seen any member of the SIU cross a picket line? A. You are getting into an involved area where there are sometimes questions raised of representation——

Q. I said any picket line. Just tell me yes or no. A. I would have to research the record to find an example.

The Court: Now, you don't need to look

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at any records to know what your eyes have seen. You tell me whether you have ever seen a seaman, SIU member, cross a picket line. Have you ever seen that or not?

A. I personally have never seen it, Your Honor. I know that it has happened, but I personally have never seen it.

The Court: He asked you if you had seen it. That's the only question.

Go ahead, Mr. Deakins.

Q. (By Mr. Deakins) Mr. McCartney, have you ever served on a vessel that was struck? A. No, I can't say that I have.

Mr. Perkel: Your Honor, I will just ask the question just to make the question clear. Does he mean

did Mr. McCartney ever scab or was he serving on a vessel which was struck and he was on strike?

Mr. Deakins: No. I was going to ask him the next question.

The Court: Let's clear that up first.

A. May I answer your question, sir?

Q. (By Mr. Deakins) You don't ask questions. I will ask them.

The Court: Don't answer it yet.

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I will sustain the objection.

Now, ask the next question.

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Q. Mr. McCartney—McCartney, is that it? A. McCartney, right.

Q. Have you ever been a member of a crew on a vessel that was struck? A. Yes, I have in the past due to a longshoreman's strike in the Port of New York.

Q. Do you ever recall the SIU having been on strike? A. We haven't been on strike in the last twenty years, to my knowledge, as far as a general strike is concerned.

Q. Have you been a member of a crew on a vessel that has ever been struck during your seagoing life? A. Yes, by the longshoremen, by the International Longshoremen's Association.

Q. Did your crew members come ashore at that time? A. We didn't sail the vessel but we remained on board the vessel.

Q. All right, you answered my next question. You didn't sail while the vessel was being struck, did you? A. Our employment was maintained by the company.

Mr. Deakins: Move to strike the answer as not responsive, Your Honor.

The Court: The objection is sustained. He wants to know whether you sailed the ship.

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A. No, we did not sail the ship.

Q. Now, would your union—you being what, a patrolman? A. Yes, sir.

Q. —sail any vessel that was struck? A. It would be against our policy.

Q. Have you ever seen a longshoreman cross a picket line at a vessel that was struck? A. Not to my knowledge.

Q. How about any of the others, the American Radio Officers Association, or MEBA, or any of these other seagoing unions, have you ever seen them work a vessel that was picketed? A. It again depends on who is picketing it. If there is a question of representation of the crews aboard the vessel, where they were in competition with one another, I think in this instance they would cross the picket lines of the other unions. And this has happened in the past.

Q. Have you ever seen a situation where the SIU, or any of the associations involved in picketing which are picketing a vessel where the longshoremen would work the vessel? A. Not to my knowledge.

Q. Let me read you something and ask you if you agree

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with this, and I want you to listen very carefully and just answer me yes or no. I want to read this quotation to you.

"If foreign flag operators would realize that they should pay American seamen standard wages and cause their ships to have American seamen's standard working conditions, then the defendants"—that's the people here—

"would have accomplished their educational goal by communication and would cease their activities."

Do you agree with that or not? A. Do I have to answer yes or no, Your Honor?

The Court: You may answer yes or no and if you think an explanation is needed I will listen to it.

A. I would have to answer yes to that.

Q. You answer yes to that? A. Right.

The Court: Now, you can explain it if you need to.

A. I think a great deal more is entailed than just what you have read. There is a great deal more to this than just what you have read in this statement there. As far as the decided differences in the wages, the rates of overtime, the various

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benefits, the pension, welfare and pension benefits, which are all part of the cost of operating a ship under the American flag, I think all of this has to be taken into consideration in answering the question that there is a great deal more at stake than just what you read there.

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Q. Well, now, you answered a question previously before about the intention of your committee with reference to whether or not to keep foreign flag vessels from the American shores and said no that wasn't your intention. I want to ask you what your committee would propose to do to keep, to permit foreign flag vessels to come to the American shores and work?

Mr. Perkel: Objection, Your Honor. That's a future conclusion. I thought we were dealing here with a conduct which is going on now. This is at best speculative.

The Court: There has been some allegation of threat of future action in this case. If this is relevant to that, I need to hear it. The objection is overruled.

What do you propose to do?

A. We had hoped to gain the support of the American public and to encourage them to solicit their patronage of American ships. We have had various committees, slogans, SOS, save our ships, to encourage them to ship aboard American vessels, to patronize American steamship companies.

And in this fashion, in this manner we had hoped to increase our participation by gaining

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more cargo for American ships because without cargo even the most modern efficient vessels built, the new LASH vessels, the new CB vessels, cargo aboard ship vessels, barge aboard ship, unless you are able to participate and gain some of the cargo, without cargo no steamship company can remain in business.

The Court: Now tell us what you propose to do. That was the question. You have already told us that you have done this. Now, do you propose to do anything else is what Mr. Deakins asked you.

A. Just to continue our same actions, our same methods by trying to encourage, to increase the knowledge of the

average American citizen as to what is really at stake here. Not only as far as the American seaman but also the drain of dollars, the role of the merchant marine as a future arm of defense in event of war, which the record speaks for itself along those lines.

The Court: Mr. McCartney, we are going to be here all week if you continue repeating what you have already told me. Most of what you have said in the last three minutes you told me ten minutes ago.

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Now, Mr. Deakins simply asked you what do you propose to do different than what you have already done. And you have answered that saying "Nothing, we intend to continue."

A. That's correct, sir.

The Court: Is that the answer to the question?

A. That is the answer, sir.

The Court: Please limit your answers to the questions counsel asks you, because if I have to listen to this speech every time somebody asks you a question we are going to be here all week, and I don't think your employers would like for you to spend that much money.

Go ahead, please. Ask your next question.

Q. Mr. McCartney, you said that you were appealing to the American public. Is that right? A. Yes, sir.

Q. The only appealing you did was down at the docks with a picket sign, wasn't it? A. No, in addition to that we distributed leaflets.

Q. Where, at the dockside? A. At various steamship companies in New York, to the general public.

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Q. You don't know about the situation in Houston, do you? A. No, I don't, sir.

Q. You say that you intend to do this by appealing to the American public even though you know that no maritime union, or the ILA has ever crossed a picket line, to your recollection, unless there was some little dispute among the unions, is that right? A. Yes, we intend to continue this distribution of leaflets.

Mr. Deakins: Move to strike the answer as not responsive.

The Court: Well, you did ask him two questions in one. If you will separate them, I can rule on your objection.

Q. Mr. McCartney, you say in answer to other questions that you don't recollect any union, maritime union, or the ILA ever crossing a picket line; isn't that right?

Mr. Perkel: Objection, that is not right, Your Honor. The witness has previously testified that representation issues——

The Court: Let him say whether it's right or not.

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A. With the exception. There have been instances where they have crossed picket lines as a result of competition for representation aboard the vessels.

Q. Then let me modify my question to say, in a situation like this, where the unions were picketing a vessel, or the ILA was picketing a vessel under such circumstances as there are here, or for the purpose of organiza-

tion, you don't know of a time when a union crossed a picket line, one of the maritime unions or the ILA, do you? A. Personally, no, but I have read about them crossing.

Mr. Deakins: I move to strike the last of that answer.

The Court: I will disregard what he has read about it. Personally he doesn't. Now, go ahead and ask your next question.

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Q. Then your picketing at Mobile and New Orleans was at the dockside, wasn't it? A. Yes, sir.

Q. And you passed our leaflets down there to them, laid them around on the ground and whatever was available close there, isn't that right? A. Yes.

Q. And I assume, I think the testimony here is that that was what was done in Houston? A. Yes.

Q. Now, the American public are uptown and about the cities. Did you in your picketing at Mobile or at New Orleans go out into the public areas and carry picket signs or pass out these leaflets? A. I did not participate in the picketing in either New Orleans or Mobile.

Q. Then you don't know anything about it, is that right? A. I participated in the meetings, the discussions to prepare for the demonstrations to call this to the attention of the American public.

Q. You went down there just to hand them these documents and then left, is that right? A. And to givve them instructions and to answer any question that they might have.

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Q. In the discussions you had in New York, was there

any plan to go out in the cities and pass out leaflets or carry picket signs? A. Yes, there were.

Q. Where does that appear in the minutes that have been offered here? A. The second meeting held on November 2nd this appears.

Q. It appears where? A. In the minutes of that, where it had been discussed and was concluded that this would be a suitable course of action for us to follow.

Q. You weren't asked any questions in connection with Defendants' Exhibit 8 on any meeting of November 2nd, were you? A. No, only on October 22.

Q. You have a copy of those November 2nd minutes with you, do you? A. Do we have a copy of the minutes of November 2nd?

Mr. Perkel: By all means. You left an envelope here, or did you take it?

A. Yes, it's over at the chair there.

May I read from this?

Q. No, I want to look at them. I am not going to get those put in evidence.

Well, Mr. McCartney, I have looked at a

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letter of November 5th, 1971, on the firm stationary of Schulman, Abarbanel, Perkel & McEvoy, signed by Mr. Schulman, which apparently had attached to it a resume of some meetings of the American Seamans ad hoc committee and a meeting held at 10:30 a.m. on November 2nd, 1971, at 17 Battery Place, New York, New York, where Mr. Calhoon presided. A. That's correct.

Q. Is that the meeting you talk about? A. Yes, sir.

Q. Was this the material you had in mind when you gave me that last answer, where you say where it was

said in these minutes that, "Discussion was had and unanimously resolved to prepare leaflets for distribution at home offices of certain shippers and shipping companies." Is that what you had in mind? A. Yes, sir.

Mr. Deakins: I move to strike his answer as not responsive.

The Court: Which answer?

Mr. Deakins: The answer he gave me a while ago where he said they intend to go out in the public and advertise this.

Mr. Perkel: I don't understand at all,

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Your Honor.

Mr. Deakins: His minutes refute his answer, Your Honor.

The Court: What was his last answer?

The Witness: I am rather confused, Your Honor.

The Court: What was the last answer, Mr. Reporter?

Mr. Deakins: He said what I read to him was the fact. The answer before that was that they intended to go out in the public and advertise these.

The Witness: I said we did.

The Court: This says that they are going to print leaflets?

Mr. Deakins: Go to specific shipping offices, something like that. I read it in the record; home offices.

The Court: Is it your contention that specific shipping offices are not members of the public?

Mr. Deakins: I thought he said the general public. At least that was what my question was intended to be.

The Court: That is exactly what he

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said earlier.

Mr. Deakins: Up on Main Street and out in the city. That is what he said, yes, but that isn't what the minutes said.

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Mr. Perkel: Let us enter the minutes and consider this the best evidence and that would solve, I imagine, everybody's problem. I offer these as Defendants' 9.

The Court: Are you contending that the steamship companies are not part of the general public?

Mr. Deakins: They are part of the general public, Your Honor, but this witness, I asked him a question, if the Court will remember, about going out to the public and up on Main Street, and he said this doesn't say that.

The Court: This argument has obscured my memory of your reading of the minutes. Did you read the word "exclusively" in here?

Mr. Deakins: I can't quote it exactly, Your Honor.

The Court: Let's read it again. If it says "exclusively," your objection is good.

Mr. Deakins: Yes, sir.

The Court: If they are a part of the general public, then I will overrule your objection.

Mr. Perkel: Your Honor, it reads:

"B. Raskin reported on publicity matters and

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preparation of new leaflet after consultation with counsel, as attached. Report, after discussion, unanimously accepted.

"Discussion was had and unanimously resolved to prepare leaflets for distribution at home offices of certain shippers and shipping companies. Such material to be prepared by B. Raskin and approved by counsel as to legal issues. In addition publicity of the issues in the dispute should be taken by B. Raskin via all media."

Mr. Deakins: He said certain shipping companies, and that's not the general public.

The Court: I will take note of both answers.

Mr. Deakins: Thank you, Your Honor.

The Witness: May I say something, Your Honor?

The Court: No, you are on the witness stand. You reply only to questions. If we get everybody making speeches here, we will never get through.

Just ask your question, please. Your counsel will ask you such questions as he thinks you should answer.

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Q. (By Mr. Deakins) Incidentally, those minutes I read you were prepared by Mr. Perkel, weren't they? A. The last?

Q. Were the last ones? A. I believe they were prepared by Mr. Schulman.

Mr. Deakins: By Mr. Schulman. That's all.

The Court: Mr. Perkel, do you have further questions?

Mr. Perkel: First, Your Honor, I would like to offer this as Defendants' 9 just so we keep the record straight.

The Witness: This is part of it.

Mr. Perkel: Do you want to take a look at it in its full blown glory?

Mr. Deakins: I have seen it.

I object to this, Your Honor, because it's self-serving, hearsay, and I think it directly contradicts what the witness has testified to.

Mr. Perkel: Your Honor, I offer it on the same grounds as the prior minutes, that it's not offered as to the truth of the contents in them, merely the actions were taken.

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The Court: Admitted for the limited purpose. I assume, Mr. Deakins, that you do want the part that you read into the record?

Mr. Deakins: Yes, Your Honor. I read that to him, and I think I identified it as such.

The Court: It is admitted for the limited purpose expressed.

Do you have any further questions, Mr. Perkel, of this witness?

Mr. Perkel: Yes, Your Honor.

The Court: Go ahead, please.

(Defendants' Exhibit No. 9 was marked.)

Examination by Mr. Perkel

Q. Mr. McCartney, are you aware of the Robin Line beef? A. Yes, I am.

Q. And of the Floridian beef? A. Yes, I am.

Q. In both of those situation, did not SIU members cross picket lines? A. This is what I had in mind in discussing representation aboard a vessel. This is one instance where the ILA crossed the picket lines, rather the SIU

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crossed the picket line of the ILA and the Masters, Mates

and Pilots over the collective bargaining representative, representation rights for the crew on board this vessel, the Floridian and also during the Robin Line beef, which goes back to 1957.

Q. One other thing, Mr. McCartney. Are you familiar with the picketing being conducted by the committees and defendant here up in Diluth [sic] and Superior, Wisconsin; Diluth, [sic] Minnesota, and Superior, Wisconsin?

Mr. Deakins: I object to this as not within the scope of this case and it's not proper rebuttal.

Mr. Perkel: Let me show you where it is going. If Mr. McCartney is familiar, he will be able to testify, if he knows it, that the ILA in Superior, Wisconsin, is respecting the line, and the ILA in Diluth, [sic] Minnesota, is going through the line like water, if he knows it.

The Court: If we are going to try every one of these pickets throughout the United States, we will never get through with this litigation. I am going to have to ask you gentlemen to limit it to what is happening here in Houston,

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Harris County.

* * *

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Paul Drozak, was called as a witness by the defendants and, having been first duly sworn, testified upon his oath as follows:

The Witness: Paul Drozak, 5846 Schevers, S-c-h-e-v-e-r-s, Houston, Texas.

The Court: All right, Mr. Drozak. Have a seat on the witness stand.

You have been sworn, haven't you?

A. Yes, sir.

The Court: Go ahead, Mr. Perkel.

Examination by Mr. Perkel

Q. Mr. Drozak, could you tell us who you are employed by, please? A. Seafarers International Union.

Q. In what capacity, Mr. Drozak? A. As business agent.

Q. Mr. Drozak, you have been sitting in this court and hearing certain testimony with respect to a committee to save the American flag or ad hoc committee.

Are you familiar with that committee?

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A. Yes.

Q. Did you in fact receive instructions from that committee? A. Yes.

Q. Did you receive instructions from that committee in writing? A. Yes.

Q. Did you act pursuant to those instructions? A. Yes.

Q. Could you tell us what you did in the Port of Houston concerning the written instructions you received from that committee? A. Our instructions were to picket foreign flag ships under Panamanian and Liberian and Honduran flags. We set up pickets on——

Q. Mr. Drozak, when you say "we," who do you mean? A. The committee.

Q. Is that the same committee I am talking about or a committee in the Port of Houston? A. The committee in the Port of Houston, which is a branch of the headquarter's [sic] committee of the international union.

Q. Who are the members or participants of that committee in the Port of Houston? A. Mills of the National Maritime Union, Dolley of

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the MEBA District 2, Palombo of the Masters, Mates and Pilots, and myself of the Seafarers International Union.

Q. Did you function in any way as ad hoc chairman of that subcommittee? A. No. Dolley has functioned as chairman of the committee. Dolley, D-o-l-l-e-y, of MEBA District 1.

Q. Could you tell us what actions that committee took and what you did next with them? A. We followed the instructions after a meeting with Mr. DiGiorgio and Shapiro, who had come down from New York to give us the instructions as to the problems of the American Merchant Marine, what was consisting of cargoes not being shipped on American flags, and what we called the runaway monkey flags was taking the cargoes. Our ships was idle. Our seamen are idle, and we have no jobs, and we had to do something to bring it to the attention of the public and the shippers that the American Merchant Marine is in desperate need of cargo and that they were shipping the cargo on these monkey flags, as we call them, at substandard wages where our people were out of work.

Q. Mr. Drozak, did you engage in any picketing of any kind?

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A. Yes. On October the 28th, we had, I think it was, three Panamanian and Liberian ships in the Port of Houston, and we immediately went back to our union halls and we

asked for volunteers to set up picket lines on Panamanian and Liberian ships in the Port of Houston.

Q. Did you get those volunteers? A. We got the volunteers with no problem.

Q. Did you give them any instructions? A. We instructed them that they were going to walk the picket line with a picket sign. If anyone asked them any question, to refer them to the picket sign, give them a leaflet, which we had available for distributing, and that was it.

Q. Mr. Drozak, I call your attention to the first annexed sheet of Defendants' Exhibit 8 in evidence and the second annexed sheet, which is after the minutes, and ask you to examine them, please, the first being entitled "Picket sign" and the second one being entitled "leaflet."

(Short delay.)

Q. Mr. Drozak, are those the picket signs which you gave out and the leaflets you gave out? A. Yes, sir.

Q. Exclusively, or wasn't there also one other piece

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of literature? A. There was another additional leaflet that went out also.

Mr. Perkel: Would you mark this for identification?

(An instrument was marked for identification as Defendants' Exhibit 10.)

Q. Mr. Drozak, I ask you to look at Defendants' 10 for identification.

Is that the other literature you were handing out? A. That's the second leaflet.

Mr. Perkel: Your Honor, I offer this in evidence at this point.

The Court: Is there any objection to Defendants' 10?

Mr. Deakins: No objection.

The Court: It will be admitted without objection.

(Defendants' Exhibit 10 was received in evidence.)

Q. (By Mr. Perkel) Mr. Drozak, you testified that seamen were idle.

Do you have any records which would indicate what the number of jobs available for

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seamen in the SIU is today? A. Yes.

Q. And do you have records which would indicate what jobs were available in a comparable period, let us say, a year ago? A. Yes.

Q. Did you in fact examine those records before you came over here? A. We examined them for the last three or four years.

Q. Could you give us for a comparable period how many jobs are posted now on the board available for American seamen in the SIU? A. I can say compared to two years ago, in the Port of Houston, which is one of our largest shipping ports in the United States, our shipping figures have dropped sixty percent.

Q. You mean there are sixty percent less jobs available today? A. That's correct.

Q. How about ships? Do we have as many contracting ships? A. No.

Q. You mentioned in your testimony that there were ships idle. A. That's correct.

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Q. Do you know whether any ships are idle and could you tell us what their names are? A. Yes. We have since the first of this last year idle because of no cargo available the following ships in the Port of Houston:

The Keva Ideal, Keva Corporation; the Overseas Audrey, Maritime Overseas; the American Victory, Victory Carriers; the Texas Erie, Hudson Waterways; the Transhuron, Hudson Waterways; and the Cakins, Texas City Refinery.

These six ships represent to our union alone in the Port of Houston 180 jobs.

Q. Do you know whether the SIU has made any attempts to meet foreign competition by reducing various scales, wages or anything of that nature? A. Yes.

Q. Could you tell us about that, please? A. Yes. On Isthmian Steamship Company two years ago we reduced our manning scale by three persons in the unlicensed crew in order for them to try to compete with the foreign operators in the Indian and around the world trade, which Isthmian has had for some fifty or sixty years. These ships that were reduced were twenty-eight in that particular fleet at that time.

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Q. Any others? A. Yes. Columbia Marine Steamship Company, which operates thirteen C-2's, did operate thirteen C-2's, we reduced the manning scale on those ships by four men in the unlicensed crew.

Q. Do you have any idea how many jobs this cost the SIU? A. Well, the total crew was thirty-one, and we reduced it to twenty-seven; so that's thirteen times—over a hundred jobs.

Q. Now, with respect to the picketing, Mr. Drozak, did

you in fact see any occasions where pickets were out picketing? A. Yes.

Q. Could you describe for us what you saw and where you saw it and when you saw it? A. Well, I saw it on practically every place that we have established a picket line and maintained it, every ship.

Q. Could you tell us where that was, to the best of your recollection? A. Well, one was at the bulk plant, one was at the grain elevator, several at the City Docks at public facilities here in the Port of Houston.

Sometime during the late hours of the

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night I would drive down to the picket line just to make sure that everything is okay, shoot the breeze with the pickets a little bit. We would have two pickets walking and two pickets sitting to relieve on each watch, at each place.

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Q. Did you ever see any of the pickets violating any of the instructions which you gave? A. No, sir.

Mr. Perkel: I have no further questions, Your Honor.

The Court: You may cross examine, Mr. Deakins.

Examination by Mr. Deakins

Q. Mr. Drozak, you said you reduced the crew of vessels of some company—I couldn't understand the name of it—by three men? A. Isthman Steamship.

Q. Isthman? A. Isthman. States Marine, Isthman. It's called Isthman, but it's States Marine, controlled by States Marine.

Q. You reduced them three men? A. Yes, sir.

Q. And the vessel could sail and did sail, is that right? A. Yes, sir.

Q. And they have been sailing? A. Not since then.

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Q. They are idle now, are they? A. They have been sold to a foreign company, sir, transferred.

Q. How long did they sail with a crew minus three men? A. Up until about eight months ago.

Q. From what time? A. Two years ago.

Q. What were the complement of those crews? A. The crews on those ships was 34 men.

Mr. Perkel: Your Honor, I would like to make clear for the record that I believe when Mr. Drozak says the crew he is talking about the unlicensed crew. Is that correct?

The Witness: Unlicensed personnel, yes.

Q. That's what I meant, Mr. Drozak.

Mr. Drozak, when you got instructions from New York about this picketing and were given the leaflets, you were told what to do and what this was all about, weren't you? A. I knew what it was all about for some several years.

Q. But did these people tell you anything else about what it was all about? A. Yes.

Q. What did they tell you the dispute was?

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A. The dispute is simple. The foreign flags are taking all of the cargo. The American operator cannot get any cargo. Therefore, our people are out of jobs.

Q. So your dispute, then, was with the foreign flag vessels, right, for getting your jobs? A. Our dispute is

with the American shippers. We want the American cargo shipped on American ships, under American flag, to where we can maintain our quota of jobs for our people.

Q. Mr. Drozak, you wouldn't dispute the leaflet that was given to you out of New York as shown by Defendants' Exhibit 8, would you, wherein it says, and you are supposed to fill in the name of the vessels, "Our dispute is limited to the vessel picketed at this site, the SS Westwind"? A. That's right.

Q. So then there is a dispute with a vessel, according to this leaflet, isn't that right? A. With the vessel and with the shippers, that's correct.

Q. Right.

Now, if these shippers, these foreign flag vessels—I don't want to confuse you—the foreign flag vessel owners, because they pay

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crews less money than American seamen and because they maintain more less favorable working conditions, you contend that you can't be competitive; is that right? A. The American ship operator can't be competitive.

Q. That's right. A. That's right.

Q. But your people get their jobs from him, from the American ship operator, so you have an interest in this thing? A. Naturally we have an interest.

Q. And your interest is to get all of the business and keep the foreign flag vessels away from these shores, isn't that right? A. No. No, sir.

Q. It is not? A. No, sir.

Q. Then your interest is to get the foreign flag owners to increase the wages and working conditions of their people so that you will be competitive with them; isn't that right? A. So that our American operator can com-

pete with them on the cargoes where our people can have jobs, that is right.

Q. But that would mean that they will have to increase

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their costs so you will be competitive, your ship owners will be competitive with these foreign flag vessels, thereby your men will have the work that they used to get? A. Not necessarily.

Q. Well, then what is your answer? A. If the foreign operator who operates these ships under the Pan el banco, Panamanian, Liberian flag would pay wages and conditions equivalent to the American operator, then the American operator can compete for the cargoes and get some of the cargoes which they do not get now.

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Q. And that's what you intend to accomplish by this picketing, isn't that right? A. We are trying to.

Mr. Deakins: That's all. Thank you, Mr. Drozak.
The Court: Any further questions, Mr. Perkel?

Examination by Mr. Perkel

Q. Mr. Drozak, are you a member of the committee sitting in New York City? A. No, sir.

Q. You receive your instructions from that committee? A. That's right.

Q. Has the committee instructed you with respect to the objects of this picketing? A. No.

Q. Can you tell us whether the testimony which you just gave with respect to the foreign flag operation is an expression of your intention or of this committee's intention? A. That is my personal opinion which I an-

swered is my feeling is one of the problems in this country today, not the committee's feeling. I don't know

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what this committee is going to do. What action they may tell us to do tomorrow may be something different than today. This is my personal opinion.

Mr. Perkel: I have no further questions.

The Court: Mr. Deakins, any further cross examination?

Examination by Mr. Deakins

Q. You are in charge of the picketing here, aren't you, Mr. Drozak? A. No, sir.

Q. Who is? A. The committee is.

Q. Well, you are on the committee? A. That's correct.

Q. Now, you attend meetings of the SIU regularly when they have them in New York and other places, don't you? A. No, sir.

Q. You have been a long-time member of the staff of the SIU, haven't you? A. Twenty-five years.

Q. For how long? A. Twenty-five years.

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Q. During the 25 years that you have been a business agent—is that it? A. Yes.

Q. —you have represented the SIU in the Ports of Houston, Galveston, in the Sabine area, have you not? A. That's correct.

Q. And you disseminate the policies of the SIU, its policies in these areas; isn't that right? A. That's right.

Q. And you direct the picketing and all those things

that the SIU does in this area? A. That the SIU does itself in this area.

Q. Yes, sir, right. A. We have a committee that functions in this.

Mr. Deakins: Yes, sir. That's all.

The Court: Anything further, Mr. Perkel?

Mr. Perkel: Yes, just one thing.

Examination by Mr. Perkel

Q. In your normal course of duties, Mr. Drozak, with the SIU, you in fact have a great deal of discretion what you can do and what you can't do, isn't that correct?

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A. That's correct.

Q. In this case have you any discretion whatsoever? A. No.

The Court: I didn't hear you.

A. No, sir.

Q. How do you know that? A. Well, in my own discretion there is a lot personally, myself, I feel that has been done wrong to the American Merchant Marine. That is my personal opinion. What policy that will be laid tomorrow to protect our jobs and to protect the American Merchant Marine is not my authority.

Q. Did you not in fact in this case receive instructions which nobody was allowed to vary except by written instruction? A. That's correct.

Q. With respect to all activities concerning this? A. That's right.

Mr. Perkel: I have no further questions.

The Court: Mr. Deakins?

Mr. Deakins: Nothing else.
The Court: May he be excused?
Mr. Perkel: Yes, Your Honor.
The Court: Do you want him further?
Mr. Deakins: We might get him later if

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we might need him, but we can get Mr. Drozak if we need him. I know how to catch him.

The Court: You are excused, Mr. Drozak. If Mr. Deakins needs you, he will get in touch with you.

(Witness excused.)

The Court: Call your next witness, Mr. Perkel.
Mr. Perkel: Call Mr. Charles Mills, Your Honor.
The Court: Charles Mills, come around, please.

Charles A. Mills, called as a witness on behalf of the defendants, having been first duly sworn, testified upon his oath as follows:

Examination by Mr. Perkel

Q. Mr. Mills, who are you presently employed by? A. National Maritime Union.

Q. In what capacity? A. Patrolman, assistant to the business agent.

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Q. Mr. Mills, you have heard the testimony of a great many people today and on prior occasions. Are you familiar with the subject matter of this suit? A. Yes, I am.

Q. Were you the National Maritime representative to the committee functioning in Houston as part of the overall committee? A. Yes.

Q. Can you tell us what instructions you received from your headquarters; that is, the National Maritime Union headquarters, and what you did pursuant to that and if you did send out pickets what you instructed them, anything you can tell us concerning the matter. A. We received instructions from our national office in New York to meet with other unions here at the MEBA Hall, that the attorneys were coming down to instruct us how to handle the picketing and what purpose we were going to picket for; signs were made up. We were given leaflets, and our pickets, we went back to our union halls and asked for volunteers. We secured these people. We went out to check the waterfront to see what foreign flag ships were here, Panamanian or Liberian. After we found them, then we proceeded to place

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pickets with the instructions not to talk to anyone, any conversations only to be held between them. If they were asked any questions to give them a leaflet or refer them to the sign.

Q. Mr. Mills, may I refer you to the next sheet, it's entitled "Picket sign" and one entitled "leaflet," on Defendants' Exhibit 8 in evidence and ask you to examine them, please. I would also like you to look at D-10 in evidence.

Are those facsimile copies of the picket signs which you sent your men out with and leaflets you sent your men out with? A. Yes, they are.

Q. Would you look at the last two pages in D-8, please.

Are those copies of the instructions which you received from your headquarters? A. Yes.

Mr. Perkel: At this point, Your Honor, just for the convenience of the Court, and possibly to save time on other witnesses, I would ask that counsel stipulate that the various union representatives who will be called here received the same set of instructions, that they sent out their pickets with the same signs and with the same literature and under the same instructions,

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at least to that limited purpose, so I can obviate a whole series of questions with respect to each witness.

The Court: Is this stipulation agreeable?

Mr. Deakins: We will so stipulate, Your Honor. Of course, we want to reserve the right to ask them questions which may lead into some contradictory answers.

Mr. Perkel: Your Honor, even if I don't call a particular union witness, I will have him available for cross examination on any issue relevant to this stipulation.

Mr. Deakins: We will stipulate to that, yes, sir.

The Court: The stipulation, as the Court understands it, is that each of the defendants named in this suit issued identical instructions with identical leaflets and identical picket signs to its members and committees here in Houston. Is that the stipulation?

Mr. Perkel: And that the pickets which were dispatched in Houston were sent out with those picket signs and with that literature and in accord-

ance with the instructions contained in the instructions received from the headquarters,

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in that two witnesses have already testified that they sent their people out with instructions not to speak and to hand out literature if somebody asked you a question, and I am just saying that everybody is going to say that.

The Court: The SIU and the NMU have already testified that is a fact, and the stipulation is that all of the others did the same thing, all the other defendants. Is that agreeable?

Mr. Deakins: Yes, Your Honor, that is correct.

The Court: Very well. Let the record so show, and we will not have to ask these witnesses these questions then.

Q. (By Mr. Perkel) Mr. Mills, does the NMU currently have any ships idle and not working in the immediate area here? A. Yes, we do.

Q. Can you tell us what they are? A. The Gulf Merchant, Ashley Lykes, the Ruth Lykes, and that's all at the present time in this area.

Q. In this immediate area? A. Houston area, yes.

Q. Can you tell me how many jobs that involves out of your hall?

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A. About a hundred jobs.

Q. Can you tell me what the number of jobs, or some idea of the number of jobs, posted in your hall presently available for your members are like compared to a comparable period to some year or two ago? A. We can use the figures from last year.

Q. Would you, please? A. And compare with the same period this year, eleven months, and we found that our shipping has fallen off approximately fifty-seven percent from just one year.

Q. There are fifty-seven percent less jobs? A. Less job.

Mr. Perkel: I have no further questions of this witness, Your Honor.

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The Court: You may cross examine this witness.

Cross examination by Mr. Deakins

Q. I didn't hear the name of the idle ships, Mr. Mills. A. The Gulf Merchant, Ashley Lykes, and the Ruth Lykes.

Q. Ruth, R-u-t-h? A. Ruth, R-u-t-h.

Q. Gulf Merchant. Who are the owners of that vessel? A. The Lykes Brothers, all three of them.

Q. The chief competition of the NMU in the United States is the SIU, isn't it? A. No.

Q. Who is? A. We do not compete against one another. We are in the same field.

Q. Oh, you don't? I see. A. We have the same problems.

Mr. Deakins: Oh, I see.

That's all. Thank you very much.

The Court: Is there anything further, Mr. Perkel?

Mr. Perkel: No. I have no further

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questions.

The Court: May he be excused?

Mr. Deakins: Yes, Your Honor.

The Court: Very well. Thank you, Mr. Mills. You are excused.

(Witness excused.)

The Court: Call your next witness, Mr. Perkel.
Mr. Perkel: Mr. Karl Landgrebe, please.

KARL LANDGREBE, called as a witness on behalf of the defendants, having been first duly sworn, testified upon his oath as follows:

The Court: You have been sworn, haven't you, Mr. Landgrebe?

A. Yes, sir.

The Court: Have a seat, please, sir.
Go ahead, Mr. Perkel.

Examination by Mr. Perkel

Q. Mr. Landgrebe, who are you employed by, please? A. The Marine Engineers Beneficial Association,

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District No. 1.

Q. In what capacity, Mr. Landgrebe? A. I believe they are presently carrying me as branch agent in Tampa, Florida.

Q. And you are presently in Houston? A. I'm presently in Houston.

Q. How long have you been here? A. Since the start of this picketing.

Q. Mr. Landgrebe, could you tell us what the condition of shipping here in the Port of Houston is as opposed to a comparable period some time ago, and tell us how

you arrived at that, please? A. I went over our permanent record books. We are required to keep permanent records of all jobs dispatched in each port and the capacity of the job and whether it is permanent or relief, et cetera. These are very complete records.

Q. Mr. Landgrebe, I asked you when this first came up to examine the August, September and October, 1971 records. A. Yes, sir.

Q. And I also asked you to compare it to a year before that. A. Yes, sir.

Q. This is the period which we are in now.

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A. Right.

Q. Could you give me the results of what your shipping records show? A. Yes. A year ago, by month—this is August, September and October. If necessary, I can go into it as ratings, or you just want the total?

Q. Just the total. A. Total for the month of August, 1970, there were 42 licensed marine engineers dispatched from the Houston hall.

September of 1970 there were 33 licensed marine engineers dispatched from the union hall.

October, there were 45 licensed marine engineers dispatched from the Houston union hall.

That's a year ago.

The same period, which is the most recent period, of this year, compared to August of '70 with 42 jobs, in August of '71 there were 28 jobs.

Compared with September of '70, in September of '71—in September, '70 there were 33. In September of '71 there were 16.

In October of '70 there were 45. In October of '71, 15. That is the period that I have with me.

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Mr. Perkel: I have no further questions of this witness.

The Court: Mr. Deakins?

Examination by Mr. Deakins

Q. When did the strike commence this year among the longshoremen? A. I'm not sure of the date, sir.

Q. Was it in August? A. I said I am not sure of the date.

Q. You don't know at all? A. Not really.

Q. Haven''t any of your vessels— A. There has been so many between the West Coast and the East Coast that I am not sure.

Q. So that had some effect on the total number of engineers that shipped out during these periods? A. No, sir, not in the Port of Houston.

Mr. Perkel: Objection, Your Honor. The question has no foundation. It presupposes there was a strike here. I can tell Counsel now there wasn't. The Gulf was not down in the longshore strike.

The Court: I believe the wtiness was

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about to say that, and he is under oath.

Go ahead, sir. You may go ahead and answer the question.

A. Yes, sir, that's what I was about to say. It did not affect the Port of Houston.

Q. (By Mr. Deakins) This only relates to the Port of Houston? A. That only relates to the Port of Houston.

Q. Why did you pick those three months? A. They are the most available period, for one thnig. For another thing, it is the most recent period in our record books

that is complete. As you see, it comes from the end of October. This is barely the end of November.

Mr. Deakins: All right. That's all.
The Court: Is there anything further, Mr. Perkel?
Mr. Perkel: Nothing, Your Honor.
The Court: May he be excused, gentlemen?
Mr. Perkel: He may be excused.
Mr. Deakins: Yes, sir, Your Honor.
The Court: You are excused.

(Witness excused.)

The Court: Call your next witness, please.

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Mr. Perkel: I call Mr. Gerald Goudreau.

GERALD GOUDREAU, called as a witness on behalf of the defendants, having been first duly sworn, testified upon his oath as follows:

Examination by Mr. Perkel

Q. Mr. Goudreau, are you a member of one of the defendant unions? A. I am a member of the MEBA, sir.

Q. Mr. Goudreau, were you in fact a picket? A. Yes, I was.

Q. Could you tell us when? A. October the 28th.

Q. And could you tell us where? A. At Cargill Docks.

Q. How did you come to be a picket, Mr. Goudreau? A. I went down to the union hall to see about some work, and they were asking for volunteers; said we were going to picket the foreign flag ships, and I agreed; said, "Let's go."

Q. Did you receive any instructions? A. Yes, sir. They give us some leaflets to hand out

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and signs to carry; told us not to discuss it with anyone; just hand them the leaflets as a reply to any questions.

Q. Did you in fact go down and picket? A. Yes, sir.

Q. I'm sorry. I don't recall.

Did you tell us the name of the vessel you were picketing? A. The Theomana.

Q. Mr. Goudreau, have you been shipping this year? A. I had a relief trip earlier in the year.

Q. About how many days have you shipped this year? A. I have about 170 days; 175 maybe.

Q. Is that days worked? A. That's complete. That's days sailing, night relief and vacation time all together.

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Q. How many times did you actually get off the board shipping? A. You mean a sailing job?

Q. Yes. A. I sailed about two months.

Q. Two months? A. About two months.

Q. About sixty days? A. Right.

Q. And do you recall what it was like the year before? A. Pardon me?

Q. How many days you sailed the year before. A. Not too many. I was doing a lot of night work.

Q. How many days was that? A. About 129, I believe it was.

Q. And how many days did you sail the year before that, to the best of your recollection? A. 150 something. About 155 perhaps.

Q. Have you been registered regularly in the hall? A. Yes, sir.

Q. What kind of a ticket do you have, Mr. Goudreau? A. Third assistant.

Q. Mr. Goudreau, on the picket line did you have occasion to speak with anybody at any time? A. No, sir, not other than the other pickets.

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Q. Pardon me? A. Just the other pickets that were there with me.

Q. Did anybody in fact approach your line? A. Yes, sir, there was some traffic passing.

Q. Did you hand out any literature? A. Yes, sir.

Q. Mr. Goudreau, I call your attention to Defendants Exhibit 8, a sheet marked "leaflet," and Defendants' Exhibit 10, and ask you whether you handed out both or either of them on the picket line. A. Yes, sir. I handed out these—what is it?

Q. That one which is contained in Defendants' Exhibit 8. A. Right.

Q. You did not hand out this (indicating)? A. No. I didn't have that one there at the time.

Mr. Perkel: I have no further questions of this witness.

The Court: Mr. Deakins?

Mr. Deakins: No cross examination.

The Court: May he be excused?

Mr. Deakins: Yes, sir.

The Court: Thank you very much, Mr. Goudreau. You are excused.

(Witness excused.)

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The Court: Call your next witness, Mr. Perkel.

Mr. Perkel: Mr. Briscoe.

JOCKO D. BRISCOE, was called as a witness by the defendants and, having been first duly sworn, testified upon his oath as follows:

Examination by Mr. Perkel

Q. Mr. Briscoe, are you a member of any of the defendant unions here? A. Yes. I am a member of the National Maritime Union.

Q. Do you presently sail? A. Yes.

Q. Were you a picket, Mr. Briscoe, in this proceeding? A. I furnished transportation for the pickets.

Q. Did you in fact go to a picket line? A. Yes, I did.

Q. How did it come that you were asked to assist in this? A. I was in the hall when the news come down from

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New York about the picketing, and they asked for volunteers to carry the signs and to pass the leaflets, and so I volunteered.

Q. Mr. Briscoe, you have shipped quite a bit, haven't you? A. Yes, I have.

Q. Will you tell us how many days you shipped this year? A. I have approximately 153 days.

Q. This year? A. This year.

Q. Could you tell me how many days you shipped last year? A. Last year I had about 180.

Q. And the year before? A. I had 365.

Q. Now, Mr. Briscoe, what is your rating? A. I sail chief steward, chief cook, second cook and baker, but lately I have been taking lower jobs because there is no more jobs.

Q. What jobs did you have three years ago when you sailed 365 days, Mr. Briscoe? A. Chief steward.

Q. And last year what jobs did you have? A. I had galleyman, third cook, chief cook.

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Q. Have you any idea of the proportions, how much time on each? A. Let's see. The galleyman was four months—no. The galleyman was two months. Third cook was three months. Chief cook was two months.

Q. Is there a difference in pay between those three jobs? A. Very much so.

Q. What does a chief cook get? A. Chief cook makes five hundred eighty something. I don't recall.

Q. How about a galleyman? A. Galleyman makes three something.

Q. This year what have you shipped as? A. Second cook and baker.

Q. What's the difference in pay between second cook and baker and your rate of chief cook? A. My rate is chief steward.

Q. Chief steward. A. It's about $250 difference. This is the base.

Q. What is the rate for chief steward? A. Chief steward is six hundred seventy-one.

Q. And baker? A. Baker is four hundred fifty-one.

Q. Galleyman?

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A. Galleyman is three hundred forty-eight.

Q. I believe you said you also sailed as a chief cook? A. Right.

Q. What is the pay for that? A. Five hundred seventy-six, I think.

Q. Mr. Briscoe, you hold a chief steward's rate, is that correct? A. Yes, sir.

Q. Can you tell us why you took jobs as galleyman and— A. There is no other jobs in the hall. If you want to live, you have to take what come in.

Mr. Perkel: I have no further questions of this witness.

Mr. Deakins: No questions, Your Honor.

The Court: All right. May he be excused, then?

Mr. Deakins: Yes, sir.

The Court: You may be excused, Mr. Briscoe. Thank you for coming.

(Witness excused.)

Mr. Perkel: Your Honor, if we could have a brief recess, possibly I could speak with counsel as to the rest of my witnesses and we may be

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able to stipulate to them.

The Court: Very well. Let's take ten minutes, and if you are not finished by that time, advise me in Chambers about how much more time you need.

(A recess was taken.)

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The Court: Are you prepared to go forward now?

Mr. Perkel: Your Honor, we have discussed the matter in the recess, and we have agreed to stipulate, to convenience the Court and all counsel, that any witnesses who are called, pickets, picket witnesses who were called, would testify in the same manner, to the same effect as the witnesses who were called.

With that stipulation, Your Honor, I would ask

that this Court recess the matter until tomorrow morning, as I intend to have one more witness who may testify with respect to the materials which were delivered to us today concerning the seamen's wage vouchers for various of the vessels which were promised to be delivered to us.

It may very well be that this witness will not be necessary after examining them, but I do not envision more than one or two witnesses tomorrow morning at the most.

The Court: We have had one picket witness testify, and that's Gerald Goudreau, I believe.

Mr. Perkel: Jocko Briscoe. Jocko

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Briscoe testified he wasn't a picket.

The Court: Briscoe said he supplied transportation to pickets.

Mr. Perkel: Let me modify that. I will call one more picket witness, and it will round it out. I thought I had two, but Your Honor's recollection is correct. Mr. Briscoe just testified that he transported pickets. So after the calling of one more witness today, the stipulation would be as we stated it, and we would ask the matter be adjourned until tomorrow morning.

The Court: Let's call the picket then and get him off so he can get back to work.

Mr. Deakins: Your Honor, we will stipulate as to this other additional picket.

The Court: The points of the testimony seem to me to be that the pickets did not converse with anybody. There is no evidence of violence.

Mr. Deakins: Handed out leaflets.

The Court: They handed out leaflets and carried a sign, and we have pictures of the sign in evidence as well as the leaflets. Is that correct?

Mr. Perkel: Correct, Your Honor. And with that stipulation, then, I have no problem.

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The Court: Very well. No violence, no conversation, and he further testified that there were only two pickets at each ship.

Mr. Perkel: Two picketing, four pickets. There were two up and two on relief.

The Court: Well, two pickets on duty at any one time.

Mr. Perkel: Yes, Your Honor.

Mr. Deakins: Yes, sir.

The Court: And two pickets on duty at any one time. Very well, the stipulation is agreeable to the Court, and it will be made of record.

* * *

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EUGENE P. SPECTOR, a witness called on behalf of the defendants, having been first duly sworn, testified upon his oath as follows:

Examination by Mr. Perkel

Q. Mr. Spector, can you tell us who you are employed by? A. I am employed by the National Maritime Union.

Q. In what capacity? A. Research director.

Q. Mr. Spector, can you give the Court a brief resume of your prior work history and your qualifications? A. Yes, sir. I have a Bachelor of Science from George Wash-

ington University in business administration, '47; '50, law degree from the same university.

I was employed for three years in the industrial relations department of the American Trucking Association, three years with the Department

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of Labor as a labor economist, a year with the Department of Commerce as transportation attorney.

I spent five years as labor and cost analyst in maritime problems with the National Academy of Sciences, and then eight years with the American Merchant Marine Institute, which is a trade association of American flag steamship companies, and the last five years as research director for the National Maritime Union.

Q. Mr. Spector, can you tell us whether you have been involved in any of the contract negotiations for the National Maritime Union with its contract employers? A. I was involved in the 1969 negotiations, which was the last contract, and also involved with reopeners in 1967 and '68. On the other side of the bargaining table with the employers, the bargaining group, which was the American Merchant Marine Institute, I was involved in the collective bargaining in the wage reopener in 1955, and in 1961 contract renewal and in the contract extension in 1963, which brought the contract through to '69.

Q. Mr. Spector, can you tell us from your knowledge whether the National Maritime Union in their

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collective negotiations have attempted to meet the problem posed by the foreign competition?

Mr. Deakins: I object. This is immaterial. It is based on hearsay testimony; no showing that any

of these plaintiffs were parties to that or had knowledge of it at the time or any statements made in their presence.

The Court: The objection is sustained.

Q. Mr. Spector, has the National Maritime Union reduced its manning scales? A. Yes, sir.

Q. Can you tell us what has been done in that connection? A. Most recently we had two ships with Moore McCormack Lines that they had no commercial use for. They attempted to charter the vessels to the Military Sea Lift Command, and in order to meet the charter rates the government was prepared to pay, they requested the union to reduce manning. At that time we had 30 unlicensed seamen on the vessel. We reduced the manning to 28.

When that vessel was in commercial service in subsidized operations, it had 34 men so that it now had a crew reduction of six men on two ships. But we have worked out arrangements

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on tanker and dry cargo vessels for manning reductions for most of our contract companies in order to keep some degree of stability in labor costs.

Mr. Deakins: I object to any further question on this line. It has no bearing on these proceedings, Your Honor. I couldn't tell where this was going or I would have objected to the question.

Mr. Perkel: This objection comes about a day too late, because yesterday we had testimony from witnesses, two witnesses, with respect to reduction of manning scales on their vessels in an attempt to meet foreign competition.

The Court: This objection is overruled to the last question.

Q. Mr. Spector, the reduction of manning scales resulted in approximately how many jobs lost to the National Maritime Union? A. When I first came with the National Maritime Union, which was the end of 1966, at our convention we announced that we had around 22,500 jobs. In 1968 I put in an IBM system of keeping track of all of our vessels, and in September of '68 we had 19,596 berths. In July of '69 it was 17,314. In June of

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'71 it was down to 9,649, and currently we are running around 9300 jobs. So we have had an enormous loss of berths.

Q. Mr. Spector, in the course of your employment, have you had occasion to examine into and study general wage levels paid to maritime, unlicensed maritime employees and compare these levels to the general industrial level in the United States? A. Yes, sir.

Mr. Deakins: I object to this as immaterial, Your Honor; no relation to the issues in these proceedings.

The Court: The objection is sustained.

Mr. Perkel: Your Honor, one of the items in this proceeding is the fact that we are claiming that they are depressing our standards. One of the issues I would hope to show through this witness along with this line of questioning was the maritime worker earns no more than the average industrial worker in the United States and that his standard is in fact slightly lower, and that the threat to his standards is significant. I ask Your Honor, in light of that, in that direction which I wish to move, that you reconsider your ruling.

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The Court: In the opinion of the Court, the comparison between seamen's wages and other industrial wages would open this hearing to a Pandora's box of unlimited examination by both sides concerning various trades, crafts and comparison of the hours of work, et cetera, which I don't think would be proper in this proceeding. For that reason I am going to sustain the objection and will hear no evidence concerning comparison of seamen's jobs with other jobs other than foreign seamen.

Mr. Wright: Your Honor, would the Court hear an offer of proof?

The Court: You may make such offer of proof as you want to, gentlemen.

Mr. Wright: Your Honor, we would like for the record to show that if the witness were permitted to testify——

The Court: Let him testify. I am going to disregard what he says.

You may answer that question on this Bill of Exception, Mr. Spector.

Restate the question, please, Mr. Perkel.

Q. Mr. Spector, could you compare for us the general

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level of maritime unlicensed wages with the general industrial level of wages in the United States? A. Yes, sir. Very simply stated, I think the all-manufacturing average in comparison in an hourly rate basis in relation to the average hourly earnings, straight time, of a maritime worker would be roughly equivalent in the neighborhood of $3 an hour.

Q. Is there any distinguishing feature with respect to modification of a yearly rate if you apply that $3 an hour figure to the maritime industry? A. By reason of the nature of the type of employment in the maritime industry and the difficulty of staying with the job for a full year at best, a full-time seaman might work eight to nine months a year, and therefore his earnings would be somewhere in the neighborhood, in terms of take-home pay before taxes, of course, around $8,000 a year. This is considered to be below that standard of the Bureau of Labor Statistics necessary for a family of four to live at a level—they put out three budgets. One is a subsistence level budget for welfare purposes, one is a median budget, and one is a more comfortable budget, which allows for

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savings and additional expenditures.

The 8,000 a year would fall below the middle budget. So that I cannot consider a seaman in the American industry as being a highly paid individual on an annual basis, and with our work declining the ability of a seaman to earn money is declining.

* * *

Judgment of the District Court of Harris County, 164th Judicial District of Texas, December 10, 1971

Printed in the Appendix to Petition for Certiorari at Pages A1-A3.

Opinion and Judgment of Court of Civil Appeals of Texas, Filed May 17, 1972

COURT OF CIVIL APPEALS

FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

AFFIRMED, and Opinion filed May 17, 1972.

No. 635

WINDWARD SHIPPING (LONDON) LIMITED, et al,

Appellants

vs.

AMERICAN RADIO ASSOCIATION AFL-CIO, et al,

Appellees

Appeal from 164th District Court of Harris County

In October of 1971 the cargo vessels Northwind and Theomana, both of Liberian registry, were docked at the Port of Houston for the purpose of loading and unloading cargo. American Radio Association, AFL-CIO and five other deep sea maritime unions, acting in concert, established picket lines which longshoremen and other workmen would not cross to service such vessels. The

owners of the vessels filed suit in the district court in Harris County to enjoin permanently such picketing. The district court, after hearing evidence, dismissed the owners' suit, concluding that the court was without jurisdiction because of pre-emption by the National Labor Relations Board. The owners have appealed. We affirm the trial court's judgment of dismissal.

The basic facts of the case were established by stipulation or uncontroverted evidence. The vessels in question carry cargo between United States ports and foreign ports. They do not carry cargo from one port in the United States to another port in the United States. The crews and officers of the vessels are foreign nationals. There is no labor dispute between the owners of the vessels and their crews or the foreign unions who represent them or on the foreign contracts under which they work. The picketing unions neither have nor claim the right to represent the crews, nor do they seek to obtain such right. None of the crew members are members of the picketing unions. The picketing has been peaceful and without violence or threat of violence.

Four pickets commenced picketing the Theomana at the Port of Houston on October 28, 1971, and four began picketing the Northwind the following day. Signs carried by the pickets bore the following message:

> "ATTENTION TO THE PUBLIC
>
> The wages and benefits paid seamen aboard the vessel THEOMANA (NORTHWIND) are substandard to those of American seamen. This results in extreme damage to our wage standards and loss of our jobs. Please do not patronize this vessel. Help the American seamen. We have no dispute with any other vessel on this site." (Parenthesis added)

The signs bore the names of the picketing unions.

The pickets did not speak to anyone. When inquiry was made of them they handed out literature in the following language:

"To the Public

American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

A strong American Merchant Marine is essential to our national defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.

Please Patronize American Flag Vessels, Save Our Jobs, Help Our Economy and Support Our National Defense by Helping to Create a Strong American Merchant Marine.

Our dispute here is limited to the vessel picketed at this site, the SS ".

This literature, too, had on it the names of the picketing unions.

The refusal of longshoremen and others to cross the picket lines resulted in damage to the vessels' owners which the unions agree is incalculable.

The first step taken to stop the picketing was the filing, in behalf of the owner of the Theomana, of a complaint with the NLRB charging the unions with secondary picketing. The next day suit was filed in behalf of such owner in the district court of Harris County seeking temporary and permanent injunction. The petition in that suit also alleged that the unions were guilty of secondary picketing. The complaint with the NLRB was voluntarily withdrawn by the complainant. The pleadings in the district court of Harris County were amended. Those pleadings as amended alleged, in behalf of the owners of both vessels, that the picketing by the defendant unions was for the purpose of inducing the owners to breach their contracts with their crews and the foreign union representing those crews. It was alleged that such activity was in violation of Tex. Rev. Civ. Stat. Ann. art. 5154d, sec. 4 (1947) and was a tort under Texas law.

The unions answered to the suit filed by the owners, asserting the defenses that: (1) The jurisdiction over the subject matter of the dispute was pre-empted to the NLRB by the Labor Management Relations Act, 29 U. S. C. sec. 151, et seq. (1947). (2) The Norris-La Guardia Act, 29 U. S. C. sec. 101, et seq. (1932), prohibited the granting of the injunction sought. (3) The activities sought to be enjoined were protected by constitutional guaranties of free speech. (4) Tex. Rev. Civ. Stat. Ann. art. 5154d, sec. 4 (1947), if applicable to their activities, would be unconstitutional. (5) The owners were without clean hands in that their conduct was contrary to the public policy of the United States to promote the merchant marine, as pronounced in 46 U. S. C. sec. 1101 and sec. 1241 (1970). The trial court sustained the first of those asserted defenses and did not make findings of fact

or conclusions of law relating to the others. We shall likewise confine our discussions to the jurisdictional pre-emption question.

Since San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959), state jurisdiction in cases of labor disputes has been compelled to yield to the jurisdiction of the NLRB if the activities complained of are arguably either protected by section 7 or prohibited by section 8 of the NLRA as amended by the LMRA. The determination of whether activity in fact is or is not protected or proscribed by the statute is initially for the NLRB. Failure of the Board to determine the status of the activity does not pass jurisdiction to the state courts. After the Garmon case state jurisdiction notwithstanding federal pre-emption rules is confined to (1) those cases involving libel, Linn v. United Plant Guard Workers Local 114, 383 U. S. 53 (1966), and other matters "deeply rooted in local feeling or responsibility", Garmon, supra; (2) cases in which jurisdiction has been ceded to the state by the NLRB by virtue of 29 U. S. C. sec. 160(a) (1959); (3) cases in which the disputed activity is a "merely peripheral concern" of the LMRA, Garmon, supra, (e.g., breach of contract, damages for wrongful expulsion from a union); (4) cases in which the NLRB refuses jurisdiction; and (5) those cases involving violence, e.g., International Union, Etc. v. Russell, 356 U. S. 634 (1958); International Assn'n of Machinists v. Gonzales, 356 U. S. 617 (1958); United Const. Workers, Etc. v. Laburnum Const. Corp., 347 U. S. 656 (1953); Youngdahl v. Rainfair, Inc., 355 U. S. 131 (1957); United Auto., A. & A. I. W. v. Wisconsin Emp. Rel. Bd., 351 U. S. 266 (1955). The courts of Texas have adhered to these principles. Ex Parte Dilley, 160 Tex. 522, 334 S. W. 2d 425 (1960);

Carpenters & Joiners Local Union No. 1097 v. Hampton, 457 S. W. 2d 299 (Tex. Civ. App.—Tyler 1970, no writ).

This Court's primary inquiry, then, is whether the appellees' picketing here in question was arguably prohibited or protected under the LMRA (29 U. S. C. sec. 157 and sec. 158). As appellants point out, appellees' picketing carefully remained within the guidelines for permissible picketing on the premises of a secondary employer promulgated in Sailor's Union of the Pacific, 92 N. L. R. B. 547 and adopted in Local 761, Inter. U. of E., R. and M. Wkrs. v. NLRB, 366 U. S. 667 (1961). These principles, commonly referred to as the "Moore Dry Dock Rules", consider picketing of a secondary employer's premises lawful primary activity when it meets these conditions:

(1) The picketing is strictly limited to times when primary employees are present at the premises of the secondary employer or at the common premises.

(2) The primary employer is engaged in his normal business at the picketed premises at the time of the picketing.

(3) The picketing is limited to places reasonably close to the locations on the premises where the employees of the primary employer are at work.

(4) The picketing clearly discloses that the dispute is with the primary employer alone.

(5) The primary employer has no separate place of business at which a reasonable opportunity is afforded to reach his employees by picketing.

In the instant case the evidence reveals that appellees picketed only when the vessels of the appellants, primary

employers, were dockside. Secondly, when picketed the ships were being loaded and unloaded, part of the usual operation of cargo ships and the normal business of the primary employers. Moreover, the picketing was limited to the dock at which the vessels were berthed. Further, the signs carried by the picketers clearly restricted the picketing to the primary employer. And, the two ships were the only reasonably accessible places of business to which the unions could direct their attention and efforts. Accordingly, appellees were not engaged in a secondary boycott. No other violation of section 8 is intimated by the parties and none other appears from the record.

We must, then, consider whether appellees' conduct was arguably protected under section 7 of the LMRA.

Section 7 is in the following language:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title."

Peaceful picketing has repeatedly been held protected by this section of the NLRA (amended by LMRA, 29 U. S. C. sec. 157). Garner v. Teamsters, Chauffeurs and Helpers, Etc., 346 U. S. 485 (1953); Carter Carburetor Corp. v. National Labor R. Board, 140 F. 2d 714 (8th Cir.

1944); National Labor Relations Board v. Thayer Co., 213 F. 2d 748 (1st Cir. 1954); Edir, Inc. d/b/a Wolfie's v. Club & Restaurant Employees and Bartenders' Union Local No. 133, AFL-CIO, et al, 159 N. L. R. B. 72 (1966); Sears-Roebuck & Company v. Retail Store Employees' Union, Local 345, AFL-CIO, 168 N. L. R. B. 126 (1967). And see Cox, The Right to Engage in Concerted Activities, 26 IND. L. J. 319 (1951). The Supreme Court has expressly recognized that a union's peaceful picketing to protest wage rates below established area standards arguably constitutes protected activity under section 7. International Longshore. Local 1416 v. Ariadne Shipping Co., 397 U. S. 195 (1970), and cases cited therein. This is the now well-recognized "area standards" picketing.

One case is persuasive authority in support of the trial court's order of dismissal. In South Georgia Co., Ltd. v. Marine Engineers Beneficial Ass'n., 44 CCH Lab. Cas. 26,269 (La. Dist. Ct. 1961) picketing of a foreign ship with a foreign crew by an American union to protest loss of jobs by U. S. seamen from use of that ship to transport cargo purchased by Indonesia under the Agricultural Trade Development and Assistance Act was held to be arguably protected by section 7 of the L. M. R. A.

In Ex Parte George, 163 Tex. 103, 358 S. W. 2d 590 (1962), vacated 371 U. S. 72 (1963), on remand 364 S. W. 2d 189 (Tex. Sup. 1963), an American maritime union which represented unlicensed crew members on American Oil Company vessels was involved in a labor dispute with that company. The union picketed the main gate and parking lot gate at a coastal refinery operated by a wholly-owned subsidiary of American Oil. Workers at the refinery were represented by a separate union. Despite a finding, supported by the record, that the union's purpose

was to induce the violation of American Oil's existing contract with the refinery worker's union (a violation of Art. 5154d here in question), the U. S. Supreme Court held that the maritime union's picketing was arguably protected by section 7.

In this case with facts not so gross as those in Ex Parte George, there appears no persuasive reason to hold contrary to the Supreme Court's holding in George. In fact, appellants do not argue that the appellees' picketing is not of a character sufficient to fall within section 7's protection. Rather, they contend that the LMRA "does not extend to the maritime operations of foreign-flag ships employing foreign aliens, and that American union activity which affects the internal affairs of the ship and its foreign crew is not protected by the Act." Appellants base their contention on three cases: Benz v. Compania Naviera Hidalgo, S.A. 353 U. S. 138 (1957); McCulloch v. Sociedad Nacional, Etc., 372 U. S. 10 (1963); and Incres Steamship Co. v. International Maritime W. U., 372 U. S. 24 (1963). All three of those cases involved foreign-owned and registered ships with alien crews under foreign articles. In Benz the crew members went on strike and their cause was taken up successively by three different American unions. In McCulloch an American union petitioned for certification as the representative of foreign crewmen and the NLRB ordered an election. In Incres an American union picketed as part of its campaign to organize foreign crewmen. In each case the Supreme Court held that the NLRA, as amended, does not apply to foreign-registered ships employing alien seamen. This is so because the NLRB's jurisdiction is based upon circumstances "affecting commerce" and the Court concluded that maritime operations of foreign-flag ships employing

alien crewmen are not "in commerce" as that term is contemplated by section 2(6) (29 U. S. C. sec. 152(b) (1947)).

McCulloch and Incres were decided on the basis of Benz. In Marine Cooks and Stewards, supra, the Supreme Court, while involved in a construction of the Norris-LaGuardia Act, drew an important distinction between the facts in Benz and those in Marine Cooks. The Court noted that in Benz an American union, to which none of the alien crew members belonged, had a substantial, immediate interest in the "internal economy" of the ship. The Marine Cooks case involved facts essentially the same as now before us (except that picketing was by boat and not at the dock of consignee, although that was expressly threatened). Justice Black, speaking for eight justices (Justice Whittaker dissented on a separate issue), viewed the union members' interest there as being "in preserving job opportunities for themselves in this country," not in the "internal economy" of the foreign vessel. They were picketing on their own behalf and not for the benefit of foreign employees. The opinion labeled the dispute as domestic even though the employer was foreign.

The Benz case was distinguished from a case factually identical to the present case on the basis of the distinction noted by Justice Black in Marine Cooks. South Georgia Co., Ltd., v. Marine Engineers Beneficial Assn'n, supra. The Court in South Georgia characterized Benz as involving only "an internal dispute on a foreign ship." In Madden v. Grain Elevator, Flour & Feed Mill Wkrs., Etc., 334 F. 2d 1014 (7th Cir. (1964) the Seventh Circuit rejected a union's contention that, based upon Incres, the NLRB lacked jurisdiction of a dispute involving union members' refusal to unload ships so as to compel their

employer to cease doing business with a Canadian shipping company. In passing on a contempt order arising from a secondary boycott complaint, the Court found that no attempt was being made to apply the NLRA to "the internal management or affairs" of the vessels involved. In a subsequent chapter of the same dispute the D. C. Circuit sustained the finding of the Seventh Circuit that Incres was inapplicable. Grain Elevator, Flour and Feed Mill W., I. L. A., Loc. 418 v. NLRB, 376 F. 2d 774 (D. C. Cir. 1967). These cases construe the Incres case to hold not that the NLRB lack jurisdiction of *any* "maritime operations" of a foreign ship and crew, but that the Board lacks jurisdiction over the "internal affairs" of a foreign ship and crew. This is a more narrow and precise area of activity and one which hints of exclusion of the usual elements of a cargo-carrying operation and focuses only upon crew-owner relations.

In 1970 the Supreme Court was presented with a case of union picketing to protest the substandard wages paid by foreign-flag vessels to American longshoremen in American ports. International Longshore. Local 1416 v. Ariadne Shipping Co., supra. The question of pre-emption was squarely at issue. Lower courts had held no pre-emption because the NLRB lacked jurisdiction. McCulloch and Incres were the authority for that holding. The Supreme Court reversed and held that the longshore activities of American longshoremen were not within the maritime operations of foreign-flag vessels. The Court carefully pointed out that the construction of the federal statute in Benz, McCulloch and Incres,

> ". . . was addressed to situations in which Board regulation of the labor relations in question would necessitate inquiry into the 'internal discipline and order' of a foreign vessel . . .".

The Court concluded that the functions of the American longshoremen did not constitute involvement with the ships' "internal discipline and order". Application of American labor statutes to resolve a conflict over wages paid to American longshoremen thus would not interfere with the foreign ships' internal affairs. Consequently the longshoremen's operations were "in commerce" and could be subject to the board's jurisdiction.

There is still no clear statement of the Supreme Court's position as to whether the NLRB has jurisdiction of, as here, picketing by American *seamen* to protest substandard wages and conditions on foreign vessels. The picketing in the Ariadne case could not have been any less destructive to the cargo-carrying business of the ships than the protracted picketing and conflict in Benz. So, it seems that the terms "internal affairs" and "internal order and discipline" must refer to the relationship between crew and employer and not to the carrying-on of the business for which the vessel is employed (a matter between shipowner and shipper). This construction has support in the language employed by the Court in the Ariadne case where the Court refers to the crucial term "internal affairs" of the foreign ship as affairs "which would be governed by foreign law," i.e., (see footnote 4) the foreign ships' articles. Ships' articles concern such matters as seamen's conduct and obedience, wages, seamen's liability for cargo damaged or embezzled, competency in performance of seamen's duties and airing of seamen's grievances. See, e.g., 46 U. S. C. sec. 713 (1946). The issue in McCulloch and Incres was representation of foreign seamen. In Benz it was picketing to support a strike by the foreign crewmembers. To allow American unions to intercede in those instances would clearly be to

allow interference with the internal order, discipline and affairs of a foreign ship. In Ariadne the Court confronted a situation involving American workers hired by foreign ships to serve, not as seamen, but as longshoremen. As noted before, the Court held that the longshoremen's activities performed by Americans were not an element of the "foreign ships' " internal affairs.

Ariadne differs from the instant case in at least two respects. First, it dealt with longshoremen rather than seamen. Further, it concerned picketing in regard to wages to be paid to American workers who were employed by foreign employers. The casual connection between American longshoremen's duties and the foreign vessels is what excluded those functions from the reach of the term "internal discipline and order." The Court expressly reserved the question of longshore work performed by foreign crewmen. But in this case there are no American residents employed by foreign ship owners. The protest is not directed to allegedly substandard wages paid by foreign shipowners to then-employed American seamen, but to allegedly substandard wages paid to foreign seamen, with a concurrent request to the public not to patronize the foreign ships. There is no direct interference with the relationship between employer and crewmen. Any direct interference is between the consignee and the shipowner, or the shipowner and the stevedore company. The fact that appellees are seamen and not merely longshoremen cannot indicate greater involvement in the internal affairs of the ships because none are employed on those ships.

It is important also to note that the Court in Ariadne forcused upon the effect of longshore work upon the ships'

internal affairs and not upon the purpose and intent of the picketers. The purpose of the activity in question is not of controlling significance in deciding the question of jurisdiction of the activity. (See, e.g., Chief Justice Calvert's dissenting opinion in Ex Parte George, 358 S. W. 2d 590, 607). If the picketing intervenes in an alien crewmen's strike or strives to organize those crewmen it constitutes involvement with matters not "in commerce". If it but voices a complaint as to foreign wages and urges the public not to patronize foreign vessels it does not engage in matters outside of commerce. It is peaceful picketing, publicizing a labor dispute, of such a character that its validity is suggested by the Court's holding in the Marine Cooks case, supra. It is, at least arguably, a protected activity under section 7 of the LMRA. As such, it is an activity as to which the exclusive jurisdiction to determine its propriety has been preempted to the NLRB. Upon that basis the trial court properly dismissed the plaintiffs' suit for want of jurisdiction.

Affirmed.

/s/ Bert H. Tunks
Chief Justice

Judgment rendered, and Opinion filed May 17, 1972.

Order of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, June 14, 1972

Printed in the Appendix to Petition for Certiorari at Pages C1-C2.

Excerpt From Application for Writ of Error to Supreme Court of Texas

* * *

POINTS OF ERROR

POINT OF ERROR NO. 1

The Court of Appeals erred in holding that the Trial Court lacked jurisdiction, under the preemption doctrine of the Labor-Management Relations Act, to determine the issues in this case.

* * *

Order of the Supreme Court of Texas, Refusing Application for a Writ of Error, October 4, 1972

Printed in the Appendix to Petition for Certiorari at Pages D1-D2.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1061

WINDWARD SHIPPING (LONDON) LIMITED, *et al.*,

Petitioners,

—v.—

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,

Respondents.

ON CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF OF THE REPUBLIC OF LIBERIA AS *AMICUS CURIAE*

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The interests of the Republic of Liberia in the instant case are limited but important. They lie at the heart of this dispute. The Liberian merchant marine is today the largest in the world; Respondents would blockade Liberian vessels from American ports. It is the position of the Republic of Liberia that Respondents' actions, and those of their individual members, constitute an open interference with the internal order, economy, management and affairs of vessels of the Republic of Liberia, and that such attempted interference is not protected or sanctioned by any applicable law, but, on the contrary, is in violation not only of the law of this land, but also of international law and Liberian law, via reciprocal treaty provisions.

Accordingly, the Republic of Liberia requests the permission of the Court to appear herein and to submit the following brief in the capacity of *amicus curiae*. Both Petitioners and Respondents have consented to the filing of this brief.

The Republic of Liberia respectfully urges this Honorable Court to reverse the judgment of the court below, dated May 17, 1972, with directions to remand this case to the District Court of Harris County, 164th Judicial District of Texas, for hearing and determination on the merits.

Opinions Below

The opinions and orders of the courts below appear at pp. 125-139 of the joint Appendix to the Briefs on the merits herein.

Question Presented

Whether the courts of the several States have jurisdiction to hear and determine the matter raised by Petitioners, where specific treaty provisions both guarantee their access to the courts and guarantee freedom of commerce and navigation.

Treaty Provisions Involved

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES AND LIBERIA. SIGNED AT MONROVIA, AUGUST 8, 1938. (54 STAT. 1739).

ARTICLE I

The nationals of each of the High Contracting Parties shall be permitted . . . to engage in . . . commercial work of every kind without interference; to carry on every form

of commercial activity which is not forbidden by the local law; . . . and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the State of residence or as nationals of the nation hereafter to be most favored by it . . . .

. . . . . .

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

. . . . . .

Article VII

Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation.

Article XIV

The merchant or other private vessels and cargoes of one of the High Contracting Parties shall, within the territorial waters and harbors of the other Party in all respects and unconditionally be accorded the same treatment as the vessel and cargoes of that Party, irrespective of the port of departure of the vessel, or the port of destination, and irrespective of the origin or the destination of

the cargo. It is especially agreed that no duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties or charges of whatever denomination, levied in the name or for the profit of the Government, public functionaries, private individuals, corporations or establishments of any kind shall be imposed in the ports of the territories or territorial waters of either country upon the vessels of the other, which shall not equally, under the same conditions, be imposed on national vessels.

Article XV

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

Article XVI

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties shall be permitted to discharge portions of cargoes at any port open to foreign commerce in the territories of the other High Contracting Party, and to proceed with the remaining portions of such cargoes to any other ports of the same territories open to foreign commerce, without paying other or higher tonnage dues or port charges in such cases than would be paid by national vessels in like circumstances, and they shall be permitted to load in like manner at different ports in the same voyage outward, provided, however, that the coasting trade of the High

Contracting Parties is exempt from the provisions of this Article and from the other provisions of this Treaty, and is to be regulated according to the laws of each High Contracting Party in relation thereto. It is agreed, however, that nationals and vessels of either High Contracting Party shall within the territories of the other enjoy with respect to the coasting trade most-favored-nation treatment.

CONSULAR CONVENTION BETWEEN THE UNITED STATES AND LIBERIA, OCTOBER 7, 1938 (54 STAT. 1751).

ARTICLE X

A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided, however, that such jurisdiction shall not exclude the jurisdiction conferred on local authorities under existing or future laws.

Foreign Law Involved

The Liberian Maritime Law

(Title 22 of the Liberian Code of Laws of 1956, effective March 1, 1958, as amended through 9 May, 1970, effective 24 November 1970.)

• • • • •

Section 353

Protection of Freedom of Association.—It shall be unlawful for any employer, employer organization or labor organization to coerce any seaman in the exercise of his choice whether to establish, become a member of or participate in any labor organization, provided that any provision in a labor contract entered into pursuant to Section 355 of this Chapter shall not be deemed to be violative of this Section. (Eff. Aug. 18, 1964.)

• • • • •

Section 357

Protection of Labor Contract.—Whenever an employer or employer organization and a labor organization have entered into a labor contract providing that such labor organization shall be sole bargaining representative of seamen pursuant to Section 355 it shall be unlawful:

(a) for the employer or employer organization to bargain with or enter into a labor contract pertaining to such seamen with any other labor organization; or

(b) for any other labor organization to attempt to bargain with or enter into a labor contract pertaining to such seamen with the employer or employer organization;

prior to thirty days before the termination of such agreement or before the expiration of three years from the effective date of such agreement, whichever event shall first occur. (Eff. Aug. 18, 1964.)

Section 358

Strikes, Picketing and Like Interference.—(1) It shall be unlawful for any person or labor organization subject to this Chapter to promote or to engage in a strike or picketing or like interference with the internal order or operation of a vessel, unless such strike, picketing or like interference:

(a) takes place at a port at which the Shipping Articles terminate; and

(b) a majority of seamen on the vessel involved have voted by secret ballot that such action be taken; and

(c) at least thirty days written notice of intention to take such action has been given to the employer or the Master.

(2) Nothing contained in Section I hereof shall be deemed to permit any strike, picketing or like interference with the internal order or operation of a vessel contrary to the provisions in any existing labor contract. (Eff. Aug. 18, 1964.)

* * * * *

Statement of the Case

The Republic of Liberia adopts the statement of the case appearing in the Brief of Petitioners.

Summary of Argument

The United States and Liberia have respective Treaty obligations to ensure freedom of commerce and navigation each to the other's vessels and cargoes. The explicit language of the Treaty and the spirit of the Treaty are both entitled to an interpretation most favorable to the rights herein claimed by Liberia. Respondents and their members, as individual citizens of the United States, are bound to honor the Treaty obligations and to take no action impairing the Treaty rights; should this Court permit the provisions of the Treaty to be ignored and Liberia's freedom of commerce and navigation to be impaired, other nations most favored by the United States will thereby be similarly affected. The courts of the States are not only free from any restrictions of federal law to take cognizance of this matter, but are affirmatively bound by the Treaty and the Constitution of the United States to do so. The judgment of the court below is therefore in error.

ARGUMENT

I.

Introduction

The courts below, going upon the most restrictive conceivable interpretation of the National Labor Relations Act, refused even to consider the basic issue of treaty violation by Respondents and their individual members.

The treaty here drawn into principal consideration is the Treaty of Friendship, Commerce and Navigation (hereafter "FCN") between the United States and Liberia signed

at Monrovia on August 8, 1938. The Treaty is completely reciprocal in its terms, and was drawn to accommodate subsequent changes in maritime circumstance, though at that time the maritime power of Liberia was very small, and that of the United States very great. Liberia, then as now, was a country rich in natural resources which were beginning to be exported in quantity; the only means of such commerce being the sea, the potential benefit to American Flag shipping was obvious.

The effect of this Treaty was to open up the commerce of Liberia to the United States on a most-favored nation basis. But beyond "most-favored-nation" clauses, certain explicit rights in respect of navigation and merchant shipping were granted by each Party to the other; those most relevant to this case are contained in Articles VII, XIV, XV, and XVI, which are set out *supra* pp. 3-4.

The issue in this case is of absolutely crucial international importance. A treaty right ignored is a treaty right abrogated; and a treaty obligation ignored becomes no obligation at all. Nowhere are such treaty questions more important than here, where the national security and international commerce of the contracting Parties are directly and obviously affected by the outcome.

A substantial percentage of imports to, and exports from, the United States of America are carried by Liberian vessels, pursuant to the FCN Treaty. If vessels of the Republic of Liberia may actually be prevented by Respondents from unloading or receiving cargoes at ports of the United States of America, the result must be that both the economies of Liberia and the United States will suffer.

But the vital questions of law, both domestic and international, overshadow even the considerable economic im-

pact. For the Treaty here in question between the United States and Liberia undertakes that:

> ". . . there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties . . . shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation."[1]

and that

> "Merchant vessels . . . under the flag of either of the High Contracting Parties *shall be permitted to discharge* portions of cargoes at any port open to foreign commerce in the territories of the other High Contracting Party . . . and they *shall be permitted to load* in like manner at different ports in the same voyage outward . . . ."[2]

A classic exposition of the nature of treaties and their status as the supreme law of the land under the Constitution[3] is that of John Jay in *The Federalist,* No. LXIV:

> "Others, though content that treaties should be made in the mode proposed, are averse to their being the supreme laws of the land. They insist, and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new

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[1] Article VII.

[2] Article XVI. Italics supplied.

[3] Constitution of the United States of America, Article VI, cl. 2.

truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and, consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period or under any form of government."

Put another way, the sanctity of a treaty rests upon a pledge made before the world by the States party to it that it is a solemn contract, made for consideration, which each commits itself to uphold and which each may hold the other to.

II.

The Treaty is entitled to the broadest construction in favor of the rights claimed by a Party to it.

If the language of the Americo-Liberian FCN Treaty were ambiguous as to the navigation and merchant shipping rights accorded by the Parties each to the other the status of this, as other treaties, as the supreme law of the land would require application of the specific canon of interpretation laid down and repeatedly enunciated by this Honorable Court:

> "Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred. Shanks v. Dupont, 3 Pet. 242, 7 L.Ed. 666. Such is the settled rule in this court." *Hauenstein* v. *Lynham,* 100 U.S. 483, 487 (1879).
>
> "In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred. Jordan v. K. Tashiro, 278 U.S. 123, 127,

> 49 S.Ct. 47, 73 L.Ed. 214; Geofroy v. Riggs, 133 U.S. 258, 271, 10 S. Ct. 295, 33 L.Ed. 642; In re Ross, 140 U.S. 453, 475, 11 S. Ct. 897, 35 L.Ed. 581; Tucker v. Alexandroff, 183 U.S. 424, 437, 22 S. Ct. 195, 46 L.Ed. 264; Asakura v. City of Seattle, 265 U.S. 332, 44 S. Ct. 515, 68 L.Ed. 1041." *Factor* v. *Laubenheimer,* 290 U.S. 276, 293-294 (1933).

See also *Bacardi Corp.* v. *Domenech,* 311 U.S. 150, 163 (1940); *Sullivan et al.* v. *Kidd,* 254 U.S. 433, 439 (1921); and *Nielsen* v. *Johnson,* 279 U.S. 47, 52 (1929).

Ambiguity, however, should be no problem here—the broad intent of this Treaty is explicit. Thus it is stated in Article VII that

> ". . . there shall be freedom of commerce and navigation."

One of the plain and flatly-stated objectives of this Treaty is that the ports of each Party shall be open in foreign commerce to the other (Articles VII, XIV, XVI); this Treaty pledges each Party and its nationals to welcome the merchant shipping of the other without hindrance or discrimination.

As declared by the U. S. Department of State with respect to FCN treaties in general:

> "Their objectives are the normal objectives of friendship between nations: to protect the foreigner, to maintain good order in everyday affairs, to encourage mutually beneficial relations, to strengthen the rule of law in the dealings of one nation with another. They are practical expressions of good faith and good

neighborliness as much as they are legal contracts. Their worth rests as much on their equity and reasonableness as on the number and scope of the privileges they specify; *and their spirit, which goes beyond the limits and wording of the treaties themselves, is in every way as important as the letter of the undertakings they actually make.*"

(Hearings before Subcommittee of Committee on Foreign Relations, U. S. Senate, 82d Cong. 2d Sess., May 9, 1952; italics supplied.)

That expression reflects as well the 35-year consistent view of the FCN Treaty by the Republic of Liberia.

III.

The individual and collective actions of Respondents and their members violate the FCN Treaty.

It is, of course, one of the "facts of life" in the maritime commercial world of today that American seamen enjoy, by far, the highest wage scale in the industry. In that sense, alone, the wages of the crews of every non-American merchant ship in the world are "substandard." But there are other standards than the purely domestic ones Respondents assert, and it is obvious that the wage scales of the Liberian fleet must be and remain realistic and competitive—otherwise there will be ships, but no crews to sail them. Respondents have created a situation in which their wage scale is far from "standard" and is inflated to a non-competitive level. They would therefore blockade the navigation and maritime commerce of Liberian vessels having competitive wage scales—by actions

which are intended and designed to curb the free and effective access of ships of a friendly foreign government to United States ports, working a severe disruption if not a cessation of this foreign commerce; for as stated by the Supreme Court in *United States* v. *Holliday,* 70 U.S. (3 Wall.) 407, 417 (1865):

> "Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals."

It is also a fact that the actions and objectives of Respondents (including here, as elsewhere in this brief, their individual members) in this case are discriminatorily directed at merchant vessels and cargoes of the Republic of Liberia, both as compared to those of the most favored of other foreign nations and to American Flag vessels and cargoes themselves.

A similar ability to disregard treaties guaranteeing freedom of commerce and navigation was once asserted on behalf of certain patentholders; but as this Court said, in *Brown* v. *Duchesne,* 60 U.S. (19 How.) 183 (1856), at 197-198:

> "The construction claimed by the plaintiff would confer on patentees not only rights of property, but also political power, and enable them to embarrass the treaty-making power in its negotiations with foreign nations. . . . And if a treaty should be negotiated with a foreign nation, by which the vessels of each party were to be freely admitted into the ports of the other, upon equal terms with its own, upon the pay-

ment of the ordinary port charges, and the foreign Government faithfully carried it into execution, yet the Government of the United States would find itself unable to fulfil its obligations if the foreign ship had about her, in her construction or equipment, anything for which a patent had been granted. And after paying the port and other charges to which she was subject by the treaty, the master would be met with a further demand, the amount of which was not even regulated by law, but depended upon the will of a private individual."

"... [T]he Government would be unable to carry into effect its treaty stipulations without the consent of the patentee. . . . The same difficulty would exist in executing a law of Congress in relation to foreign ships and vessels trading to this country. And it is impossible to suppose that Congress in passing these laws could have intended to confer on the patentee a right of private property, which would in effect enable him to exercise political power. . . ."

The disruption by Respondents of the navigation and commerce of Liberian vessels is, *ipso facto,* in violation of the FCN Treaty.

The most authoritative general pronouncement on the binding effect of treaty provisions on private citizens was made by Chief Justice Taney in *Kennett* v. *Chambers,* 55 U.S. (14 How.) 38 (1852), at 49-50:

"The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands

of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to the citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of this delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made."

Moreover, the duty and obligation of individual citizens of the United States to abide by the letter and spirit of the FCN Treaty with Liberia was declared in the Proclamation of President Roosevelt dated November 13, 1939, publishing the terms of the Treaty. 54 Stat. 1750 (1941).

"Now, THEREFORE, be it known that I, Franklin D. Roosevelt, President of the United States of America,

have caused the said Treaty to be made public, to the end that the same and *every article and clause thereof may be observed and fulfilled with good faith by* the United States of America and *the citizens thereof.*" (Italics supplied.)

In considering the force and effect of this Proclamation it must be borne in mind that in the area of treaty construction, the interpretations made by the executive are entitled to great weight before the courts. *Sullivan* v. *Kidd,* 254 U.S. 433, 442 (1921).

This FCN Treaty, unmodified by the Parties and unaltered in its effect, stands as the supreme law of the land. The actions of Respondents are in direct violation of this Treaty and of that law.

IV.

As a Most-Favored-Nation, any impairment of Liberia's freedom of navigation and commerce becomes an impairment to all nations similarly favored.

During the negotiations between the United States and Liberia with respect to the 1938 Treaty, a Department of State Memorandum by Mr. Hugh S. Cumming, Jr., Division of Western European Affairs, dated June 21, 1937, stated:

> "The reasons for proposing a new treaty of commerce and navigation with Liberia are:
>
> "1. To . . . put our commercial relations with Liberia on an unconditional most-favored-nation basis. . . ." 2 Foreign Relations of the U.S. 785 (1937).

A most-favored-nation ("MFN") clause "is intended to include all subjects which fall properly under the general heading or title of the formal agreement"; Herod, *Favored Nation Treatment* 5 (1901). Consequently, the favor to be accorded Liberia with respect to navigation and commerce, and particularly the explicit guarantees contained in Articles VII and XVI of the FCN Treaty[4] is, *a fortiori*, the favor to be accorded to all other FCN-MFN's. This is so because

> ". . . the purpose of the favored-nation pledge is to provide for equality of treatment in commercial relations on the part of a particular State toward other States; and, with this in view, to make certain that any subsequent privileges that may be granted to any one State, shall be automatically extended to other States with which such treaties shall have been concluded." Puente, *The Foreign Consul* 90 (1926).

But the converse of this proposition must also be true, for if any favor granted to one MFN (*e.g.*, freedom of commerce and navigation of its vessels) is impaired, then no similarly-vested MFN's may thereafter enjoy a greater favor—and, under the terms of treaties such as that with Liberia, the United States may thereby work upon itself a reciprocal impairment of the enjoyment of its favor in the territories of any or all of its MFN treaty partners.

The matters in the case at bar thus have implications running far beyond the mutual Treaty obligations of the United States and Liberia; and the Republic of Liberia, accordingly, takes the gravest concern in this issue.

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[4] *Supra*, pp. 3, 4.

V.

The courts below erred in denying jurisdiction.

(A) *The Courts of the States Are Not Barred by Federal Law From Hearing This Matter.*

In reality, the activities of Respondents are the same which confronted the Supreme Court of the United States in *Incres Steamship Co., Ltd.* v. *International Maritime Workers Union,* 372 U.S. 24 (1963). There, the ostensible purpose of the picketing by an American labor organization was to organize non-resident alien crew members who were serving aboard Liberian vessels under Liberian articles, and the picket signs there contained the now familiar "substandard" canard. Here there is no ostensible purpose; the Respondents have, by deliberate design, and in an attempt to circumvent *Incres,* carefully refrained from making any demands whatever upon the Republic of Liberia, the Port of Houston Authority, the Petitioner owners of the picketed vessels, their officers and crews, or the foreign maritime unions which represent the officers and crews of these vessels under current collective bargaining agreements. The real and obvious purpose in both cases is, however, identical—*viz.,* either to blockade ports of the United States to vessels of Liberia and so force that commerce to avail itself of United States vessels manned by Respondents, or to force an immediate alteration of the scale of wages and benefits of non-resident alien seamen (*i.e.,* to break the labor contracts now in force) to achieve a parity with that demanded by Respondents for their own members. This parity objective, with the result of eliminating the competition, has been flatly admitted by

Respondents (R. 157-59, 190-91). What is evidently meant by the picket signs' plea to "Help the American seamen" is "Help the American seamen to break the existing labor contracts between this vessel and her crew so that we may gain in competitive advantage." Thus the actions of Respondents are a direct and flagrant interference with the internal economy, management and affairs of these vessels,[8] and this Court has consistently held that in such cases there is no preemption by federal law of any applicable state law. *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963); *Incres, supra*, 372 U.S. 24 (1963).

International Longshoremen's Association v. *Ariadne Shipping Company, Ltd.*, 397 U.S. 195 (1970) is inapplicable to the instant case. The glaring and simple distinction between this case and *Ariadne* is that the picketing there was by domestic labor against wages of domestic labor; not—as here—by domestic labor against wages of foreign labor. There the non-resident alien crew of a foreign-flag vessel undertook to unload cargo in an American port with the help of non-union American dock labor; the American longshore union, contending that this work belonged to them, picketed the vessel. This Honorable Court, reasoning that "Application of United States law to resolve a dispute over the wages paid the men for their longshore work, accordingly, would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law" (397 U.S. at 200), distinguished *Benz, McCulloch* and *Incres*.

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[8] Which, under the Consular Convention between the United States and Liberia, is exclusively within the consular jurisdiction over labor affairs. See Article X, *supra*, p. 5.

Moreover, the activities of Respondents here are in reciprocal conflict with foreign law—the Liberian Maritime Law; the relevant sections, 353, 357 and 358, are set out at pp. 6-7, *supra*. The particularly applicable prohibition is contained in Sec. 358(2) of the Liberian Maritime Law:

> "Nothing . . . shall be deemed to permit any strike, picketing or like interference with the internal order or operation of a vessel contrary to the provisions in any existing labor contract."[6]

Likewise, Respondents' blockade tactics are in violation of international law—the FCN Treaty, particularly Articles VII and XVI and the reciprocity of Article XIV.

(B) *The Courts of the States Are Bound to Apply the Treaty Law of the United States.*

The Court below apparently thought consideration of treaty obligations foreclosed by the labor law doctrine of "pre-emption." This is, patently, an overly broad application of that doctrine and an overly modest approach to the function of the courts. The doctrine of preemption was created, as was said in the *San Diego Building Trades Council* decision, 359 U.S. 236 (1959), to entrust "administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and

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[6] It is interesting to compare the parallel language of the relevant statutory law of the State of Texas; Texas Revised Civil Statutes Annotated, Article 5154d, §4 (1971):

> "It shall be unlawful for any person, singly or in concert with others, to engage in picketing, which, directly or indirectly, is to secure the disregard, breach or violation of a valid existing labor agreement arrived at between an employer and the representatives designated or selected by the employees for the purpose of collective bargaining . . ."

equipped with its specialized knowledge and cumulative experience." This policy lies within "the exclusive competence of the National Labor Relations Board," and thus state courts must be barred "if danger of State interference with national policy is to be averted."

But, with respect to treaty questions, the picture is entirely different. The N.L.R.B. has no "competence" at all in interpreting and applying treaty provisions, much less an "exclusive competence." To the contrary, it must be excluded from the consideration of such questions because "the construction of treaties is the peculiar province of the judiciary." *Jones* v. *Meehan,* 175 U.S. 1, 32 (1899). In this important work, the state courts are not only *not* excluded, but are full partners with the federal courts. They may—and indeed have a duty to—interpret and apply treaty provisions in the litigation of private rights, in the same way and with the same authority as the federal courts. *Asakura* v. *Seattle,* 265 U.S. 332 (1924); *Maiorano* v. *Baltimore & Ohio Railroad Co.,* 213 U.S. 268 (1909). In Texas, this power and this duty have been previously recognized. *San Lorenzo Title & Improv. Co.* v. *Caples,* 48 S.W. 2d 329, 331 (Tex. Civ. App. —— El Paso 1932), aff'd. 124 Tex. 33, 73 S.W.2d 516 (1934); *Terrazas* v. *Holmes,* 115 Tex. 32, 275 S.W. 392 (1925).

Article VI, Clause 2, of the Constitution of the United States provides in part that ". . . all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby* . . ." (Italics supplied.) And Article I of the FCN Treaty declares that "The nationals of each High Contracting Party shall enjoy

freedom of access to the courts of justice of the other . . . for the prosecution . . . of their rights, *and in all degrees of jurisdiction established by law.*" (Italics supplied.)

Petitioners are Liberian nationals; their rights as such under the Constitution and the Treaty have been ignored by the courts below.

CONCLUSION

The judgment below should be reversed, and the case remanded to the court of first instance for hearing and determination on the merits.

Dated: August 14, 1973

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 14th day of August, 1973, three copies of the within Brief *amicus curiae* were mailed, postage prepaid, to Counsel for the parties listed below. I further certify that all parties required to be served have been served.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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Petitioners,

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al,
Respondents.

**On a Petition For a Writ of Certiorari
To The Court of Civil Appeals,
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BRIEF ON BEHALF OF THE WEST GULF MARITIME ASSOCIATION, INC., THE NEW ORLEANS STEAMSHIP ASSOCIATION, INC., THE TAMPA MARITIME ASSOCIATION, THE PENSACOLA STEAMSHIP ASSOCIATION, AND THE SAVANNAH MARITIME ASSOCIATION AS AMICI CURIAE

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To The Honorable Judges of Said Court:

CONSENT OF PARTIES

All of the parties in this case have given their written consent to the filing of this brief and such written consents have been filed with the Clerk.

STATEMENT OF INTEREST

The interests of the *amici curiae* appearing through this brief are described as follows:

A. The West Gulf Maritime Association, Inc., (hereafter West Gulf) is a non-profit corporate entity whose members (approximately 50 in number) constitute virtually all of the owners, ship agents, and stevedores concerned with the operations of vessels calling in all of the ports in the State of Texas, i.e., Houston, Galveston, Orange, Beaumont, Port Arthur, Freeport, Corpus Christi, and Brownsville, and the Port of Lake Charles, Louisiana. The West Gulf members may be fairly characterized as those firms which as owners, or as representatives of, or contractors with, owners or charterers of vessels, are involved in obtaining cargo for such vessels, arranging for their entry, clearance, and departure, providing stevedoring services, including the employment and utilization of longshoremen, and, in general, attracting, facilitating, and making possible the operations of all deep sea vessels calling at the ports described. The membership of West Gulf includes owners of United States flag vessels, owners and/or operators of foreign flag vessels, and agents servicing both United States and foreign flag vessels. The membership also includes stevedores who contract for the loading and/or discharging of ships, regardless of flag, in the Texas ports and Lake Charles, Louisiana. West Gulf members employ and utilize United States longshoremen in all cargo operations. It is to be noted that many of the members do not per-

form all of the foregoing services, but all of the members provide at least some of them. There are United States flag owners who are members. There are agents who are members and are charged with responsibility of soliciting cargos from United States exporters and arranging for their shipment to foreign ports as well as arranging for the discharge of foreign cargos from Texas ports and Lake Charles, Louisiana, to the United States. There are stevedore members whose activities are limited to the specific responsibility of loading and discharging vessels under specific contracts at specific ports. We feel it important that, despite the diversity of interests which one would assume might appear in such an Association, West Gulf is unanimously in accord that if the decision below is allowed to stand, disastrous ramifications can be anticipated not only by owners and operators of foreign vessels but by all of the members of West Gulf and their employees, including the thousands of longshoremen whose livelihood has for so many years been dependent upon a full and free flow of international commerce in and out of the ports involved.

B. The New Orleans Steamship Association is in all respects similar to West Gulf except that its members (approximately 50 in number) consist of owners, agents, and stevedores operating in that very major port. It would serve no purpose to reiterate the considerations set out above with respect to West Gulf, but it is, we believe, essential for the Court to realize that, while the instant case arises from Texas, the effect of the decision of the Court

of Civil Appeals, if affirmed, would necessarily affect the great and traditional port of New Orleans to a degree equal, if not greater than, that which would be experienced by the ports of West Gulf.

C. The ports of Tampa, Pensacola, and Savannah are represented herein by the aforenamed Associations whose members operate in those ports. Once again, these Associations are similarly constituted and are placed in the same potential jeopardy as the other amici in whose behalf this brief is filed.

In short, we feel it accurate to state that a very large majority of the functional maritime interests from Cape Hatteras, North Carolina, to Brownsville, Texas, are represented in this brief, with the exception of the port of Mobile, Alabama, which has filed a separate brief *amicus curiae* which is appropriate because a decision of the Supreme Court of Alabama in a related case will probably be the subject of a later petition for certiorari.

We think it extremely important to emphasize that in the membership of all of these Associations, both United States and foreign registry interests are involved. In the short run, a question might occur as to why the owners, agents and/or stevedores of American flag vessels would seek reversal of the decision. We think it clear, as we will discuss in more detail below, that the belief of the United States shipping interests is that, in the long range view, whatever problems arise between United States shipping interests and those of foreign flags, the resolution of the problem must be made either by competitive factors, given the maritime policies of the countries involved, or, at the very least, must be determined by agencies or entities within the government of the United States having

the overall economic and diplomatic expertise to negotiate, balance and set a course for the optimum utilization of this country's manufacturing, agricultural, producing, transporting, and shipping industries and all of the employees involved therein. It is our opinion, with all respect, that the National Labor Relations Board is simply not equipped to perform that function.

It is for this reason that these Associations, whose members have divergent interests, domestic and foreign, and are in a highly competitive position with each other, nonetheless feel that a decision of an intermediate appellate court in the State of Texas, however well intentioned, should not be allowed to stand, especially where it simply leaves the parties to such recourse as they may gain from the National Labor Relations Board which, once again with respect, we feel is an inappropriate ruling body.

ARGUMENT

The specific case before the Court involves two vessels which were effectively prevented from discharging cargo at the Port of Houston, Texas. It is clear from the record that there was another case in Houston, the resolution of which was deferred pending the outcome of the instant litigation. The picketing efforts of the respondent unions also reached and had effect in the Port of Galveston, Texas, where the Galveston Wharves (that Port's publicly owned authority) sought and obtained a temporary restraining order in Cause No. 109,867, *The City of Galveston v. International Organization of Masters, Mates & Pilots, et al,* in the District Court of Galveston County, Texas, Tenth Judicial District. Subsequently the determination of that cause was, pursuant to agreement with coun-

sel for respondents here, deferred pending a final resolution of the case now before this Court.

In the Port of New Orleans similar picketing efforts were successful in causing work stoppages until restrained by a State District Court there. An appeal was taken (by counsel who represent respondents here) and, while the order granting the temporary restraining order was reversed, the Louisiana appellate courts based their action solely upon overly broad provisions of the injunction under Louisiana law. See *Allied Navigation Co., et al v. Int'l Assn. of Masters, Mates & Pilots, et al,* 272 So. 2d 23, writ denied, 275 So.2d 871 (1973).

As stated above, the same type of picketing affected the Port of Mobile, Alabama. The troubles there undoubtedly will be discussed in the *amicus curiae* brief to be filed by The Mobile Steamship Association.

In addition, as the record in this case will show, not only the owners of the vessels involved were affected. Charterers, including specifically here a Japanese corporation, Toko Kisha, intervened, alleging that it was sustaining irreparable injury because of the inability to work the ship. As counsel for those charterers indicated, his client's interests were involved and, as anyone remotely familiar with the industry knows, quite often the owner of the vessel has much less at stake because of a work stoppage than the charterer who actually has undertaken to deliver or receive cargo exported or imported through United States ports.

The point which we think should be recognized at this stage is that the activity admittedly conducted by the respondents for the purpose of persuading organizations not to allow the loading and discharging of foreign flag

vessels at ports in the United States had far-reaching effects upon the members of the Associations appearing through this brief, their employees, and American and foreign growers, producers, importers and exporters, as well as the various port authorities (most of which are publicly owned) whose revenues depend upon a free flow of ocean trade across their docks.

As we see the role of *amici curiae,* there is no reason for us to burden the Court with an extensive analysis of the specific factual and legal issues which will be briefed and presented by the parties to the litigation. The primary justification for our appearance is to indicate the potentially broader scope of involvement in any decision which this Court might render than can be shown by the parties alone. However, we do feel justified in making a very summary statement of what we consider to be the basic reasons for a reversal of the decision below.

With deference, we submit that the Court below, while specifically limiting its decision to the conclusion that the trial court's jurisdiction was preempted by that of the National Labor Relations Board, nonetheless tended to confuse the question of preemption with prior decisions construing the Norris LaGuardia Act (29 U.S.C. 101, et. seq.). The two concepts we feel were additionally clouded by prior intermediate Federal court holdings concerning the propriety of remanding an action solely for injunctive relief originally filed in a state court where the Federal court, if it assumed jurisdiction, could do nothing but dismiss the sought for injunctive relief because of the proscriptions imposed upon Federal courts by the Norris LaGuardia Act. We think the remand questions are simply (1) whether the Federal court has any jurisdiction if it cannot grant the remedy prayed for

and (2) if not, whether the Federal court should take it upon itself to determine the preemption question for the state court. (The case here, incidentally was removed to, and remanded by, the United States District Court for the Southern District of Texas.)

In any event, regardless of any previous "Norris LaGuardia," "preemption," "removal and remand" confusion, the Court now clearly has before it only the question of preemption. Such preemption arises only in a case concerning activity argueably protected or prohibited by the National Labor Relations Act (29 U.S.C. 151, et. seq.). We think it extremely important to recall just why this Court felt that it was necessary to create such a preemption area in matters involving those prohibited or protected activities.

We believe that a fair reading of cases such as *Garner v. Teamsters,* 346 U.S. 485 (1957), and *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 136 (1959) leads inevitably to the conclusion that the Court felt that the National Labor Relations Board should have entrusted to it exclusive and preemptive jurisdiction over cases which it could properly and effectively investigate, concerning parties against whom it could file complaints and notices and require to appear at hearings; cases involving issues which it had experience and expertise in handling, and which required decisions it could fashion realistic remedies to implement. In labor disputes involving interstate commerce, this is settled law. However, this Court has long ago recognized that nothing in the composition, expertise, authority or functioning of the National Labor Relations Board indicates that it should exercise jurisdiction in cases where pickets are preventing the loading and discharging of foreign flag vessels at ports

of the United States solely because they feel that if such vessels are driven away from our ports, United States vessels might be used in greater numbers. This we feel was the rationale of *Benz v. Compania Naviera Hidalgo,* 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963); and *Incres Steamship Co. v. Int'l Maritime Workers Union,* 372 U.S. 24 (1963).

These *amici* respectfully but urgently ask the Court to recognize that the entire constitution and procedural scheme of the National Labor Relations Board is simply not and never was intended to be geared to determine if and to what extent foreign flag vessels, despite treaties of mutual friendship with the United States, should be denied the protection of our courts at the ports in which they call, or to sanction or prevent the free and non-discriminatory flow of commerce to and from their holds.

The Court below attempted a very technical distinction between what it felt were "internal" and "operational" affairs of the vessels in question. As *amici* we will leave this excursion in semantics to the parties involved, but we ask that the Court in effect stand back and not become too deeply emeshed in it. The fact is that if the respondent unions are allowed to picket and drive away foreign vessels with no effective judicial recourse available to any parties, foreign or domestic, wishing to ship or receive cargo, load or import the same, or to manufacture, harvest or process commodities for international movement, a sad day has come to this nation as a participant in international water-borne commerce.

We are, of course, aware of this Court's decision in *AFL-CIO v. Ariadne Steamship Co., Limited,* 397 U.S.

195 (1970), but find it of no application here. The record in this case is clear that the respondents were not attempting to obtain employment *by* the owners, charterers, or operators of foreign flag vessels of citizens of this country as was the real object of the picketing in *Ariadne*. Rather, the respondents here have used the well recognized sanction of the picket line to effect and enforce their concepts of the proper role of the United States in foreign commerce. We respectfully submit that such determinations lie with the Congress and the Executive Department of our government rather than the respondents. We further submit that the Congress did not intend, as this Court has on previous occasions held, that the National Labor Relations Board was to become involved in matters involving the internal affairs of foreign governments, employers, and crewmembers, much less the extremely complicated diplomatic and economic issues relative to our country's trade relations with other nations.

The respondents cannot go both ways. If they were engaged in a labor activity which, if domestic, would be protected or prohibited by the National Labor Relations Act and therefore exclusively under the jurisdiction of the National Labor Relations Board, this Court's decisions in *Benz, McCulloch,* and *Incres,* supra, rule clearly that there is no Board jurisdiction and therefore no preemption. If, on the other hand, the respondents take the position that their picketing is for any purpose *other* than furthering an interest protected or prohibited by the National Labor Relations Act, then by definition it is not an activity which the courts of the State of Texas are preempted from considering and judicially controlling in such manner as is legally appropriate.

CONCLUSION

The *amici* represented herein respectfully urge the Court to reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing brief have been served on counsel for all parties herein by depositing the same in a United States mail box with first class postage prepaid, addressed to counsel of record at the following post office addresses on the 16th day of August, 1973:

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IN THE

Supreme Court of the United States

October, 1972

No. 72-1061

WINDWARD SHIPPING (LONDON) LIMITED, et al.,
Petitioners,

v.

AMERICAN RADIO ASSOCIATION AFL-CIO, et al.,
Respondents

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

Opinions Below

The order of the Supreme Court of Texas dated October 4, 1972, denying petitioners' application for a writ of error determined, "that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals," and not otherwise reported. (A. 139)*

The opinion of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, dated May 17, 1972 (A. 125-138), is reported at 482 S.W. 2d 675.

The opinion and order of the District Court of Harris County, 164th Judicial District of Texas, dated December 10, 1971, has not been reported (A. 125).

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* "A" references are to pages of the Joint Appendix.

Jurisdiction

The alleged jurisdictional requisites are set forth at page 2 of petitioners' brief.

Question Presented

Whether the Labor Management Relations Act as amended, 61 Stat. 136, 29 U.S.C. Sec. 141 et seq., preempts state jurisdiction to enjoin peaceful, non obstructive and truthful picketing of select foreign flag vessels in United States ports, protesting that the wages and benefits paid and provided seamen aboard such vessels are substandard to those of American seamen resulting in extreme damage to American seamen wage standards and benefits, loss of jobs and employment opportunities here in the United States, and seeking to preserve such employment opportunities, further requesting persons not to partonize such vessels as a consequence of which, American employees of American employers refused to patronize or work upon the picketed vessels.

Statutes Involved

The relevant statutory provisions are: Labor Management Relations Act, Secs. 7 and 8(b)(4); 29 USC Secs. 157 and 158(b)(4). Such sections provisions are printed in the Appendix to this Brief.

Statement of the Case

The background facts:

The respondents are six labor organizations who collectively represent the overwhelming majority and practically almost all American merchant seamen. In late October 1971, respondents' representatives convened a meeting to

discuss the causes of the serious loss of an overwhelming number of employment opportunities (berths) for their members here in the United States aboard American Flag vessels, and to take such lawful action to arrest the decline of such opportunities and preserve those that remained (A. 68-75, Resp. Exh. 8).

It was determined, that the fundamental cause for such loss of berth opportunities aboard American Flag ships here in the United States, was the tremendous decline of carriage of American sea borne commerce in American vessels with the gain to foreign flag vessels of the transportation of such American sea borne commerce. As demonstated by a study made by the United States Department of Commerce, reflected in its Maritime Administration Annual Report for the fiscal year 1970,[1] Chart VI (A. 50, Resp. Exh. D-7), in the period of 1951 to 1969, the carriage of American sea borne commerce in American Flag ships employing American seamen, had declined from the carriage in 1951 of 39.8% of such commerce, to 4.8% in 1969. Equally shocking, was that during the same period, American sea borne commerce had increased from 193.1 million tons in 1951 to 427.9 million tons in 1969. In summary, notwithstanding an increase in tonnage of American sea borne commerce during that period of almost 125%, such commerce's carriage in American Flag vessels manned by American seamen, declined 85% (A. 53-57). During the period aforesaid, the number of American Flag vessels of 1,000 gross tons or more, had declined from 1262 ships to approximately 630 ships (A. 55).

As a consequence of all of the foregoing, berth employment opportunities for American seamen here in the United States aboard American Flag vessels, were reduced from slightly better than 93,000 in 1951, to approximately 30,000 in 1971 (A. 55, 56). Most of such decrease occurred during the last 4 to 5 years of the above period (A. 96, 97, 107,

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[1] U. S. Government Printing Office Stock No. 0307-0021, 1971

108, 110, 122). And such loss of employment opportunities occurred notwithstanding substantial measures taken by the respondents, to reduce manning and bring about other labor saving devices and costs (A. 97, 99, 121).

It was most apparent to respondents and observers, that a fundamental and prime cause for the foregoing loss of employment opportunities here in the United States aboard American Flag vessels, where the lower wages and benefits paid and provided foreign seamen on foreign flag vessels which were drastically substandard to those paid and provided American seamen aboard American Flag vessels resulting in such foreign vessels insatiable appetite to consume more and more the carriage of American sea borne commerce. In 1971, the time in issue at bar, the base pay for a typical American Able Bodied seaman aboard an American Flag vessel, was $528.46 per month (A. 108, NMU Collective Bargaining Agreement, Resp. Exh. 1), with annual earnings for 8 to 9 month service aboard an American Flag vessel, of approximately $8,000 before taxes (A. 124).[2] In sharp contrast, foreign Able Bodied seamen's wages aboard the foreign vessel, transporting American sea borne commerce, was $68.10 per month (A. 89, Pet. Exh. 12, Articles of Agreement). Such disparity conferred an enormous advantage to foreign flag vessels transporting American sea borne commerce, with most dire adverse consequences to the wage standards, employment conditions and job opportunities for respondents' members in the United States. Respondents then formed into a Committee, to take lawful steps to protect and preserve their members' American employment opportunities and standards here in the United States (A. 71-75, Resp. Exh. 8, A. 72, 73).

Respondents determined to engage in peaceful and non-obstructive picketing of selected vessels at public docks

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[2] Because of the nature of employment, being away from one's family, the average annual maritime employment is 8 to 9 months. (A. 124).

and at upon private premises with the owners' consent (A. 72, 73, 75, Resp. Exh. 8), and at upon the public streets and before home offices of certain shippers and shipping companies. In addition they determined to prepare and distribute leaflets at such locations and undertake the publicity of the issues via all media (A. 85, Resp. Exh. 9, A. 87, 91).

Respondents' Committee caused the preparation of appropriate picket signs to be carried by pickets and which read as follows:

"ATTENTION TO THE PUBLIC

The wages and benefits paid seamen aboard the vessel [3] are substandard to those of American seamen. This results in extreme damage to our wage standards and loss of our jobs. Please do not patronize this vessel. Help the American seamen. We have no dispute with any other vessel on this site." (Resp. Exh. 8, A. 73)

The picket signs bore the names of the six respondent picketing unions (Resp. Exh. 8, attachment 1, A. 72, 73, 75).

Leaflets for distribution by the pickets were prepared and read as follows:

"TO THE PUBLIC

American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

A strong American Merchant Marine is essential to our national defense. The fewer American flag

[3] The name of the vessel selected to be picketed was inserted upon the picket sign.

ships there are, the weaker our position will be in a period of national emergency.

Please patronize American Flag Vessels, save our jobs, help our economy and support our National Defense by helping to create a strong American Merchant Marine.

Our dispute here is limited to the vessel picketed at this site, the SS [4]." (Resp. Exh. 8, attachment 2, A. 72, 73, 75).

Finally, prepared and distributed were written instructions to all persons engaging in the picketing and implementing the Committee's decision, which read as follows:

"[Instructions]

Your Union, along with other American Maritime Unions, has formed a Committee, to protest the loss of jobs to Foreign Flag operators transporting American Commerce and who operate such vessels at wages and benefits substandard to those enjoyed by American Seamen.

In support of this protest, these Unions are setting up publicity picketing around such Foreign Flag Vessels in American Ports.

Our organization will participate in carrying out this publicity picketing. In connection with this activity, if the publicity picketing is to take place in your Port, the following instructions must be followed to the letter.

1. If the vessel is at a Terminal and access cannot be had alongside the vessel, request must be made to the Terminal operator for the opportunity to picket alongside the vessel. If this request is denied, picketing is to take place at the entrance to the Terminal. Make a memorandum of your conversation with the Terminal operator.

2. There should be no more than 4 pickets at any one site, at any one time. Pickets must be in-

[4] The name of the vessel selected to be picketed was inserted upon the leaflet.

structed that all picketing must be peaceful and they must ignore any acts of provocation. Picket signs with the correct language will be furnished to your Port.

3. Your Port will be furnished with leaflets. All pickets are to carry a sufficient amount of leaflets which they will distribute as they picket. Pickets must be clearly instructed that under no circumstances should they speak to anyone, and in answer to all questions, they are merely to hand the person a leaflet.

4. If anyone asks you, as Port Agent, or asks the pickets whether they should cross the picket line, no answer should be given, but instead the person should be handed a leaflet.

5. In response to any inquiries, from other Unions, to you or your representative at your Port, refer them solely to the language on the picket sign and give him a copy of the leaflet. Do No More. If any of the pickets are served with a legal paper, they are to call their Union Office immediately. They are not to speak to anybody else. In the event legal papers are served, you must notify your headquarters immediately.

6. Any and all inquiries directed to you from the Press or anybody else, should be referred to your Headquarters. Do not engage in any conversation with such persons.

7. No one has authority to change these instructions except upon specific written authority from your Headquarters." (Resp. Exh. 8, attachment 3, A. 72, 73, 75)

The foregoing material was forwarded to United States ports where selected vessels were to be picketed, including the Port of Houston where initially, three foreign flag vessels were selected to be picketed and which included the vessels at bar, the SS Theomana and Northwind. The

site and scope of vessels to be picketed were limited and select.[5]

The picketing of the vessels SS Northwind and Theomana

The vessels Northwind and Theomana are registered in Liberia (A. 16) and the latter's managing agent charterer, is Windward Shipping (London) Limited, a British corporation (A. 16, 17). The vessel's crews were all aliens as well as non-Liberians, and covered by collective bargaining agreements as follows. As to the Theomana, agreements between the owners and/or operators with the Greek Panhellenic Seamen's Federation for two separate classifications of the crew and an agreement with the Indonesian Seafarers Union for the third classification (A. 18, 25). As to the Northwind, again two separate agreements with the Greek Panhellenic Seamen's Federation for two separate classifications and the Sierra Leone's Seamen's Union for the third classification (A. 19, 25).

On October 27 and 28, 1971, the respondents at Houston commenced picketing respectively, the vessels Theomana

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[5] Similar respondents' picketing activity as at bar at Houston, was also the subject of litigation in the United States District Court in Houston wherein an injunction request was denied; the denial affirmed by the Fifth Circuit and petition for certiorari denied by this Court. *Port of Houston Authority of Harris County, Texas* v. *International Organization of Masters, Mates, etc.*, 456 F. 2d 50 (1972), cert. den. — U.S. — 93 S.Ct. 113. The Circuit's recitation of respondents' conduct in the case before it, demonstrates identical conduct engaged in at bar, to wit:

> "The unions were jointly engaged in peacefully picketing selected foreign vessels in the Houston Port. At the time of the hearing, picket lines consisting of four pickets were being maintained at three of the forty-nine docks in the port.
>
> The pickets carried placards and also handed out literature. The effort was to call the attention of the public to the declining job opportunities for the American seamen caused by the use of foreign vessels, and to the substandard wages and working conditions on such vessels. The public was asked not to patronize the foreign vessels." (Ibid. 52)

and Northwind (A. 126). It was conceded and so stipulated, that there were four respondents' pickets carrying the picket signs, non obstructive and distributing the leaflets aforesaid (A. 126); the picketing at all times was peaceful and without violence or threat of violence (A. 126); there was no dispute between the vessel and its crew and respondent unions neither had nor claimed to have the right to represent the crews, nor did they seek to obtain such right nor was their picketing on behalf of any claim of the crew (A. 126); longshoremen and others refused to work upon or patronize the picketed vessels (A. 127); and the pickets spoke to no one and upon inquiry made of them, merely handed out the aforesaid leaflets (A. 127). The vessels at the time of the picketing were partially loaded and when it was alleged that such state rendered the vessels unseaworthy, respondent unions forebore their activities and took such cooperative steps on their part, so as to render the vessels seaworthy (A. 43, 44).

The litigation proceedings to date

Petitioner's first step to restrain respondents' peaceful picketing was the filing on behalf of the Theomana, of a charge with the National Labor Relations Board on October 29, 1971, alleging that respondents' conduct was in violation of Section 8(b)(4)(B) of the National Labor Relations Act and that such conduct constituted unfair labor practices affecting commerce within the meaning of the Act (A. 13). The following day, petitioners filed suit in the Texas District Court of Harris County seeking temporary and permanent injunction alleging respondents were guilty of secondary picketing (A. 128). In the interim, the aforesaid unfair labor practice charge was being investigated by the National Labor Relations Board (A. 19). Approximately ten days thereafter the NLRB charge was voluntarily withdrawn. Simultaneously, petitioners amended their state court pleadings to allege that the purpose of

respondents' picketing was to induce breach of contracts between the vessels owners or charterers and their crews and the foreign unions representing such crews (A. 128). Further alleged, was that such activity was in violation of Tex. Rev. Civ. Stat. Ann. Art. 5154 d. sec. 4 (1947), and a tort under Texas law.

Answering petitioners suit, as defenses thereto, the respondents *inter alia* asserted that the subject matter of the dispute was preempted to the NLRB by the Labor Management Relations Act, 29 USC 141, et seq. and that the activities sought to be enjoined were protected by constitutional guarantees of free speech. After trial upon the merits for a permanent injunction (A. 45), the trial court sustained respondents asserted defense of preemption and consequently found unnecessary, the consideration of the other asserted defenses (A. 125). Upon petitioners' appeal to the Court of Civil Appeals for The Fourteenth Supreme Judicial District of Texas, said court by opinion and order made May 17, 1972, affirmed the opinion, order and judgment of the trial court on preemption grounds, and as the trial court, found unnecessary the consideration and resolution of respondents other defenses (A. 125-138).

The Texas Court of Civil Appeals in accord with the trial court, found that respondents' activities were peaceful picketing to protest substandard wages and benefits of the foreign seamen contrasted to American seamen, with the consequential adverse affect of such foreign wages and benefits upon American seamen and their job opportunities here in the United States, with a concurrent request to the public not to patronize the foreign ships (A. 131-133, 137, 138). The appellate court concluded, such respondents conduct which " * * * but voices a complaint as to foreign wages and urges the public not to patronize foreign vessels * * * is peaceful picketing publicizing a labor dispute * * * ", and upon decisional law, its validity is suggested. However, the court went on to hold, "[I]t is at least arguably a protected activity under Section 7 of the

LMRA", finally concluding, preempted by the NLRB and therefore the trial court properly dismissed petitioners' action (A. 138).

Thereafter petitioners moved for rehearing and upon denial thereof, applied to the Supreme Court of Texas for writ of error. Said writ was refused, the Texas Supreme Court finding, "no error requiring reversal" (A. 139).[6] Petitioners filed their petition for a writ of certiorari with this Court on January 31, 1973. This Court by order made March 26, 1973, invited the Solicitor General of the United States to file a brief expressing the views of the United States and the Solicitor General thereafter filed such brief. On June 4, 1973, the petition for a writ of certiorari was granted.

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[6] Uninterruptedly, petitioners from court to court have proffered, premised upon partial testimony, that a finding be made that the respondents' picketing purpose was to compel the petitioners to increase their foreign seamen wages and assumedly, to then argue, it is over the employer-employee relationship aboard the foreign vessels which the NLRB lacks jurisdiction to determine, ergo, no preemption. (See, petitioners' post trial brief before the trial court, pages 6-8, 11, 16, 17; petitioners' brief before Court of Civil Appeals, pages 11, 12, 20; petitioners' supplemental brief for rehearing Court of Civil Appeals, page 8; petitioners' application to Supreme Court of Texas for writ of error, pages 6, 7, 17.) Rebuffed in each of these four attempts, petitioners nevertheless, now request this ultimate Court to make such findings, indeed a most unusual procedure (Petitioners' Brief, p. 7). Petitioners' manifest error is demonstrated by examination of all the testimony including the cited witnesses' testimony that his expressions are his own personal feeling and opinion, not the respondents and certainly not the purpose of respondents picketing (A. 101-103). Similar thereto is the illustration of reply to a hypothetical question as to "accomplishing educational goals", by payment of equal wages and benefits both foreign and American, and whether such would result in cessation of the picketing activities. Obviously, if that occurred, the picketing would have to cease, it would then be untruthful and unlawful (A. 81-82), *Linn* v. *Plant Guard Workers, etc.*, 382 U.S. 912 (1966).

Summary of Argument

American seamen who, as found by the Courts below, peacefully, truthfully and non obstructively picket select foreign vessels on public docks protesting and publicizing substandard wages and benefits of the crews of such foreign vessels and the adverse effect thereof upon American seamen employment opportunities here in the United States and concurrently request American workers and the public at such sites not to patronize and work upon such vessels, are engaged in the exercise of the Act's Section 7 rights to preserve their employment opportunities here in the United States. Such conduct is actually protected by the Act and immune from state court interference, *Garner* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776,* 346 U.S. 485 [1953]; *International Longshoremen's Local 1416* v. *Ariadne Shipping Company,* 397 U.S. 195 [1970], concurring opinion Mr. Justice White at 202. At least such conduct is arguably protected by the Act, *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 [1959], and similarly immune from state court interference.

As further found by the Courts below, respondents activities were not to organize or represent the foreign crews aboard the select vessels whether by picketing, the invocation of NLRB election processes or in support of any foreign crews strikes or disputes with their foreign vessel employer, conduct such as was present in *Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138 (1957); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963); *Incres Steamship Co.* v. *International Maritime Workers Union,* 372 U.S. 24 (1963). The American seamen activities here, as markedly distinguished from the conduct and findings present in the foregoing trilogy, do not embrace the internal discipline and order of a foreign vessel. Nor do their activities, again as distinguished from the foregoing trilogy, require the Act's construction which

would necessitate NLRB inquiry into and regulation of, said internal discipline and order of the foreign vessel, the situation present in the foregoing trilogy. It is only "certain maritime operations" of a foreign flag vessel with a foreign crew, the activities and conduct present in the aforesaid trilogy, which are not in "commerce" within the Act's meaning and which makes inapplicable said statute's provisions to the regulation and administration of such foreign vessels employer-employee relations, *Ariadne supra.*

However, American seamen who are exercising Section 7 rights here in the United States to lawfully protest and publicize their loss of domestic employment opportunities here and seek to preserve such opportunities in the United States and which conduct clearly belies any attempt or purpose to organize or represent foreign crews aboard foreign vessels, whether by picketing or invocation of NLRB election procedures, or in support of foreign crews disputes with their foreign employer, are engaged in "commerce". Such activity is protected and immune from state interference, *Ariadne supra.* Although the vessel is foreign, the dispute is domestic. *Marine Cooks & Stewards Union* v. *Panama Steamship Co.,* 362 U.S. 365 [1960].

Congress by the Act's provisions *inter alia,* provided American workingmen with a bill of rights, *Benz supra.* Nor may such specific delineated Congressional enacted rights and their exercise in the United States, integral parts of the Congressional scheme, be fragmented, negated and exceptions carved out, premised upon Congressional enactments unrelated to labor legislation and whose concern is directed to wholly different national policies.

Vessels which enter our territorial waters subject themselves to our laws and their application in our jurisdiction, including the exercise of the foregoing Section 7 rights by American seamen directly related to a domestic issue,

to wit, the preservation of employment opportunities in their homeland. The intermittent calls of foreign vessels at United States ports do not authorize the extraterritorial application of foreign laws of such vessels' nations, to preclude or frustrate the implementation of our laws in our territories. It is always the laws of the United States that governs within our jurisdiction. *Uravic* v. *F. Jarka Co.,* 282 U.S. 234 [1931].

The Act's proscriptions and protections, its rights and remedies, manifiest our national policy. The Act's scheme encompasses all conduct within our jurisdiction without regard to the nationalities of the parties and notwithstanding the disputes origin. American seamen activities exercised in the United States seeking to preserve their employment opportunities here, do not constitute conduct warranting, requesting or necessitating extension of the Act beyond our territory. On the contrary, such activities are domestic implementation of the Act's protected rights, *Ariadne supra.*

Respondents activities are actually protected, *Garner supra,* and at least, arguably protected, *Garmon supra.* Such activities constitute protected conduct and necessitates no further inquiry as to whether they are arguably protected. Notwithstanding, petitioners suggest and indicate, assuming arguendo the Act's application to the issue at hand, respondents conduct is at best arguably protected and the *Garmon* doctrine, concluding that arguably protected rights are immune from state court interference, should be reassessed.

The underlying policy considerations for the Garmon rule continue viable to date and we express accord with the merits of the rule. Paramount however are fundamental considerations which impel the conclusion, that change of the rule if any should be legislative and not judicial.

The impact of the *Garmon* rule had been directed to Congresses attention and discussed in debate in 1959 during

consideration and enactment of major changes in our national labor policy. Notwithstanding, Congress saw fit not to abrogate the rule. Instead Congress opted for a selective approach and where it saw fit to limit the rule's application to specific issues, it so acted rather than abrogate the rule in its entirety. Such rule represents the legislative determination and one which should not be disturbed, modified or abrogated by the judiciary, in due deference to our tri parte concept of government.

ARGUMENT

I.

The National Labor Relations Act preempts state jurisdiction to enjoin peaceful, non obstructive, primary picketing of a foreign flag vessel in the United States by American seamen truthfully protesting the substandard wages and benefits paid and provided as contrasted to American seamen, and the adverse affect such substandard conditions have on American seamen and their employment opportunities here in the United States, concurrently requesting the public not to patronize such vessel,

1. Peaceful, truthful and non obstructive primary picketing by American workmen, protesting substandard wages and benefits paid, are activities actually protected by the Act.

It is unquestioned that peaceful and truthful primary picketing, non obstructive and without trespass upon private property, by American workers protesting substandard wages and benefits paid, such as at bar, constitutes the exercise of the Act's Section 7 rights and actually protected by the Act. Such activity and conduct is immune from state judicial control preempted by federal law, to wit, the Act. *Garner* v. *Teamsters Chauffers & Helpers Local Union No. 776,* 346 U.S. 485, 499-500, (1953); *United Steelworkers of America* v. *NLRB,* 376 U.S. 492, 499 (1964); *In-*

ternational Longshoremen's Local 1416 v. *Ariadne Shipping Company,* 397 U.S. 195 (1970), concurring opinion Mr. Justice White at 202. Such preemption applies whether or not there is proximate employer-employee relationship, *Hotel Employees Union* v. *Sax Enterprises,* 358 U.S. 270 (1959); *Retail Clerks Local 560* v. *F. J. Newberry Co.,* 352 U.S. 987 (1957) and *Pocatello Building & Construction Trades Council* v. *C. H. Elle Const. Co.,* 352 U.S. 884 (1956).

The Texas courts below found respondent's activities to be lawful primary picketing,[7] and citing *Garner,* supra and supporting authorities, held, "Peaceful picketing has repeatedly been held protected by this Section (7) of the NLRA." (A. 131, 132). Further, relevant to discussion of the impact if any, of the factor that the primary site picketed were two foreign vessels, the Texas Courts concluded that, "its validity" (actually protected) "is suggested" (A. 138) and "* * * at least arguably, a protected activity under Section 7 of the NLRA". (A. 138). We hereafter discuss the aforesaid "arguably protected" concept. Suffice it to state at this juncture, the American seamen's activities at bar constitutes typical lawful primary picketing, sanctioned and protected by the Act, *Garner* and *Ariadne,* 397 U.S. at 202 *supra.*

The petitioners challenge at hand, is not to the character of respondents conduct as constituting activity actually within Section 7's protection, rather it is to the Section's applicability because the vessels are foreign with foreign crews. We respectfully submit that such challenge is unfounded.

2. The decisions in Benz, McCulloch, Incres, and Ariadne.

In support of their contention, petitioners cite this Court's decisions in *Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138 (1957); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963); *Incres Steam-*

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[7] In accord, see findings in fn. (5), supra.

ship Co. v. *International Maritime Workers Union,* 372 U.S. 24 (1963) and *Ariadne, supra.* Such reliance by petitioners is in error.

Our starting point is *Benz.* There the foreign crew aboard the foreign flag vessel went on strike and picketed their vessel in a United States port, 353 U.S. at 140. The foreign crew then designated an American union as their collective bargaining representative and picketing continued by the crew, the designated American union and other American unions in support of the economic demands of the foreign crew notwithstanding existing foreign shipping articles made in a foreign country at the voyage's commencement. The issue before the Court was the applicability of the Act to the aforesaid controversy. After reaffirming Congresses' power to make the Act applicable to such controversy when such vessel "was within our territorial waters" (*ibid.* 142), the Court concluded that Congress however, did not so choose, holding: "Our study of the Act leaves us convinced that Congress did not fashion it to *resolve labor disputes between nationals of other countries operating ships under foreign laws*" (*ibid.* 142, emphasis supplied).

Significant to the issue at bar, in referring to appropriate and applicable legislative Report, the Court emphasized that the Act was "* * * both for American workingmen and their employers", and that object prescribes the boundaries of the Act as "the workingmen of our own country and its possessions" (*ibid.* 144).[8] The Court concluded, that to include within the Act's coverage disputes between foreign ships and their foreign crews, to be resolved and regulated by the Act's provisions, the issue there, would represent a 'sweeping provision' as to foreign applicability.

In *McCulloch,* an American union petitioned the NLRB, invoking the Act for a representation election to be con-

[8] Reiterated in *McCulloch* supra 372 U.S. at 18, 20.

ducted by the Board among the foreign crew members of a Honduras flag vessel who were already represented by a Honduras union and certified under Honduras law. Similarly, in *Incres,* decided the same day with *McCulloch,* picketing was directed to a foreign vessel with a foreign crew by an American union formed for the primary purpose of organizing and representing foreign seamen aboard foreign vessels. The issue presented was whether the Act extends to the foreign crews aboard the foreign vessel *McCulloch* at 12. This Court, in accord with *Benz,* held the Act to be inapplicable to a foreign vessel's "internal discipline and order", *McCulloch* at 19, regulation through the Act's provisions to activities "directly related (to the foreign vessels) employer-employee relationship", *Incres* at 28, further pointed out that such Board regulation surfaced the "possibility of international discord" and retaliation, *McCulloch* at 19, and concluded that the Act was not applicable to such internal discipline and order of the maritime operations of the foreign crew, *McCulloch,* 372 U.S. at 20, *Incres,* 372 U.S. at 27.

The patent thrust of the foregoing authorities, as demonstrated by this Court's subsequent *Ariadne* decision, discussed *infra,* is that "certain maritime operations" of a foreign flag vessel with a foreign crew, to wit, its internal order and discipline, its employer-employee relations of the vessel and its crew, are not in "commerce" within the meaning of the Act's Section 2(6) and consequently the Act's provisions are inapplicable to the regulation and administration of such employer-employee relations. However, lawful protected conduct here in the United States such as at bar, which clearly belies any attempt or purpose to organize or represent the foreign crews aboard foreign vessels whether by picketing (*Incres*), or invocation of NLRB election procedures to the vessel and its crew (*McCulloch*), or in support of foreign crews strikes over their employer-employee issues (*Benz*), but which on the contrary, openly manifest the exercise by

American workers here in the United States of independent and specifically provided enacted federal rights, are in "commerce" within the meaning of the Act's Section 2(6), *Ariadne, supra.* None of respondents aforesaid conduct, seek or require the imposition of the Act's provisions to the regulation or administration of the internal order and discipline of petitioners vessels.

In *Ariadne,* this Court held that longshoremen picketing a foreign vessel with a foreign crew protesting that longshore work being performed by "employees of the ship and some of it by outside labor" 397 U.S. at 197, was "being done under substandard wage conditions" (*ibid.* 197), constitutes lawful activity subject to and covered by the Act and that the *Benz, McCulloch* and *Incres* holdings are inapposite.

The *Ariadne* court in discussing the *Benz, McCulloch* and *Incres* holdings, noted, 397 U.S. at 198, 199:

> "This construction of the statute * * * was addressed to situations in which Board regulation of the labor regulations in question would necessitate inquiry into the 'internal discipline and order' of a foreign vessel, an intervention thought likely to 'raise considerable disturbance not only in the field of maritime law but in our international relations as well."

No such construction for Board inquiry or regulation of the foreign crews labor relations is present or conceivable let alone necessitated, in the matter at bar. In fact, none is sought or even suggested.

Referring again to the foregoing trilogy, identifying the disputes and issue there present for determination, the *Ariadne* Court identified such disputes, as "disputes between foreign ships and their foreign crews" 397 U.S. at 198, 199, and as to which the Court found were not expressly covered by the Act. Such are the disputes which involve

"internal affairs" and "internal order and discipline of the foreign flag vessel".

We reiterate at bar there is not present, as dissimilar from the aforesaid trilogy, any dispute between the foreign ships and their foreign crews. On the contrary, the dispute here is solely domestic. It is by American seamen here in the United States protesting their loss of employment opportunities here in the United States, seeking to preserve those remaining, and neither supporting by picketing or otherwise any dispute between the foreign vessel and its foreign crew.

The critical difference between the trilogy cases and the case at bar is that in the trilogy there were attempts to export American law and make it applicable to foreign vessels, foreign jurisdiction, the internal economy of the foreign vessels. At bar, it is the petitioners who seek to export their foreign law into our nation and prevent application of American law in our country. This distinction is most critical, for as we show in our Point 4 supra, such application of foreign law is improper.

3. NLRB jurisdiction is applicable to the case at hand, notwithstanding the vessels are foreign flags.

As found by the courts below, "the basic facts * * * were established by stipulation or uncontraverted evidence", (A. 126). Foreign flag vessels now carry 95% of American seaborne commerce. This condition has been brought about substantially by foreign vessels substandard wages and conditions contrasted to those of American seamen. And, as conclusively demonstrated and found, such has had dire effect upon American seaman and their employment opportunities here in the United States. To preserve their remaining job opportunities here in the United States, respondents members engaged in protest picketing of select vessels at select sites, publicizing the foregoing facts and requesting the American public not to

patronize such foreign vessels.[9] As additionally found, there is no dispute between the petitioners and their employee alien crewmen. The respondents neither have nor claim the right to represent the foreign crews, nor seek such right, nor do they seek to support the foreign crewmen in any disagreement they have or may have with petitioners. Additionally, none of the alien crews are members of respondents' unions and the latters protest picketing has been peaceful, limited in numbers to four pickets, select and without violence or threat thereof. The pickets carrying the aforesaid picket signs spoke to no one and handed out literature containing details of their protest. Longshoremen and others, American employees of American employers, refused to cross the picket lines and work on petitioners' two vessels.

The foregoing activities and conduct, as indicated by this Court in *Marine Cooks & Stewards Union* v. *Panama Steamship Co.*, 362 U.S. 365 (1960), does not constitute interference with the internal order and discipline of a foreign crew aboard a foreign vessel, its internal affairs or economy, a concern which resulted in this Court's decisions in the trilogy aforesaid. In *Marine Cooks*, the conduct was most similar to that at bar; peaceful protest picketing of a foreign vessels crews substandard wages and conditions contrasted to those of American seamen and publicizing the dire adverse consequences to American seamen employment opportunities here in the United States. The Court there stated, 362 U.S. at 371 fn. 12;

> "Unlike the situation in the Benz case, in which American unions to which the foreign seamen did not belong picketed the foreign ship in sympathy with the strike of the foreign seamen aboard, the union members here *were not interested in the internal economy*

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[9] As shown, supra, respondents also distributed literature publicizing the dispute, in other communities, cities and areas and arranged for other media communications of the issues.

of the ship, but rather were interested in preserving job opportunities for themselves in this country. They were picketing on their own behalf, not on behalf of the foreign employees as in Benz. Though the employer here was foreign, the dispute was domestic. * * * "[10] (emphasis supplied)

Of extreme significance and as found by this Court, Congress clearly and expressly formulated the Act, "both for American workingmen and their employers * * * including * * * the workingmen of our country and its possessions", *Benz,* 353 U.S. at 144, *McCulloch,* 372 U.S. at 20. And Congress did not exclude American seamen from its proclamation and grant of rights to American workingmen in our country, from exercising those rights in their homeland for their benefit, as distinguished for the benefit of aliens.

Respondents members, as American workingmen are protesting their loss of job opportunities here in the United States and seek to preserve such opportunities here. They are lawfully exercising one of the aforesaid federal rights granted by the Act's Section 7, *Garner, supra.* Respondents' dispute is here. Their members, American merchant seamen, substantial loss of employment opportunities is in the United States. They do not support or seek representation of or for the foreign crews, as in *Benz* and *Incres,* let alone utilization of the Act's provisions therefore as in *McCulloch.* Their activities, in sharp contrast to *Benz, Incres* and *McCulloch* are *not directly related* to the foreign flag vessels employer-employee relations, *Marine Cooks*

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[10] Although the Court was there resolving the definition of a labor dispute under the Norris-LaGuardia Act and thereafter in McCulloch, referred to its conclusion that the application of that Act differs from the application of the Taft-Hartley Act (372 U.S. at 18), nevertheless the fact that the NLRA rather than the Norris-LaGuardia Act is involved at bar, does not convert a domestic dispute into one which affects the internal affairs or economy of a foreign vessel with a foreign crew.

supra. To the contrary, respondents protest picketing activities is the antithesis of seeking representation rights for the foreign seamen or support thereof. Respondents are requesting that the foreign vessels and their crews be economically ostracized—don't patronize—help American seamen maintain and preserve their job opportunities here in the United States.

The dispute here is centered solely on loss of job opportunities of American workers here in the United States.[11] Nor does it reach the level of the possible conflict contained in the dispute encompassed in *Ariadne* where the Court found the dispute there, centered on wages to be paid by the foreign flag vessel to American longshoremen residents, and held the same to be a domestic dispute and not interference with the internal affairs of the foreign vessel, *Ariadne*, 397 U.S. at 199, notwithstanding the work was performed in part by the foreign crew and their wages paid, substandard to that of the longshoremen.

It is paramount to note, as distinguished from the facts in *Ariadne*, where the involved longshore work in dispute

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[11] Respondents activity is directly related to and an integral part of American seaborne commerce. Commerce under the Act's Section 2(6) infra, includes *inter alia* "trade and transportation" between the United States and any foreign country. It is such "commerce" the loss of job opportunities therein, the substantial reason therefore, and the preservation of those remaining, which respondents are protesting, publicizing and seeking mutual aid and assistance, as provided for in Section 7. The Act's Section 2(6) provides:

> "The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia, or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

was performed in part by the foreign crew,[12] but notwithstanding the same, this Court found the Act applicable, at bar none of the respondent unions members are employed by the foreign vessel or seek such employment. They have no such nexus with the vessel. Their presence is only at the vessel site publicizing their truthful protest when the vessel makes it irregular and comparative short call at a United States port to discharge and/or load its cargo. As the court below pointed out:

> "The protest (respondents) is not directed to allegedly substandard wages paid by foreign shipowners to then-employed American seamen, but to allegedly substandard wages paid to foreign seamen, with a concurrent request to the public not to partonize the foreign ships. There is no direct interference with the relationship between employer and crewmen. Any direct interference is between the consignee and the shipowner, or the shipowner and stevedore company. The fact that appellees are seamen and not merely longshoremen cannot indicate greater involvement in the internal affairs of the ships because none are employed on those ships," (A. 137).

Nor do the consequnces of respondents' lawful primary protest picketing, calling to the American public's attention the facts of the American seamen's loss of job opportunities here in the United States, and the substantial cause thereof, concurrently requesting their help not to patronize the picketed foreign flag vessels, convert such successful activity into conduct of direct interference with the foreign flag vessels employer-employee internal affairs, *NLRB* v. *Fruit and Vegetable Packers Local 670,* 337 U.S. 58, 72, (1964), cf. *Local 761 International Union of Electrical Workers* v. *NLRB*, 366 U.S. 667, 673, (1961). Nor does the fact that

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[12] With respect to such fact, this Court in *Ariadne,* 397 U.S. at 199 fn. (4) supra, put to one side, the effect if any, if such work is carried out entirely by a ship's foreign crew, pursuant to foreign ship's articles. Such possible fact however, is not present at bar.

lawful protest picketing activities occurred at the site of the vessel, constitute direct interference with the foreign flag vessels employer-employee internal affairs, *Amalgamated Food Employees* v. *Logan Valley Plaza,* 391 U.S. 308, (1968).

4. The laws of United States govern within our jurisdiction. No extraterritorial application of foreign law is permissible to impinge upon or frustrate rights provided by American law to residents in our country.

As this Court stated in *Benz,* 353 U.S. at 142:

> "It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country. Wildenhus Case 1887, 120 U.S. 1, 75 S. Ct. 385, 30 L. Ed. 565."

Further in *Benz,* this Court in its study of Congress' manifest intent pointed out *supra,* that Congress expressly created federal rights, a "bill of rights" for American workingmen here in the United States, 353 U.S. at 144. Such expressed rights constitute American law. Vessels which enter our territory are subject to the provisions of such laws and their exercise here in the United States, *Benz,* 353 U.S. at 142.

As we have demonstrated (paragraph 3, *supra*), one of such American workingmen's bill of rights, is the right to lawfully and peacefully picket in the United States to protest substandard wages and conditions which threaten their job opportunities here in the United States and to preserve such job opportunities for themselves in this country, *Garner, supra.* It is this law, the law of the United States that, "always * * * governs within the jurisdiction of the United States * * * " and that includes our territorial waters, *Uravic* v. *F. Jarka Co.,* 282 U.S. 234, 240 (1931).

Petitioners object to respondents' activities, as interference with the relationship of the foreign vessel and its

foreign crew reflected in the articles made pursuant to Liberian law and controlled thereby (Resp. Brief, p. 15). They, in thrust, effect and purpose constitute such articles and Liberian law to be binding upon American citizens here in the United States and thus to preclude, as respondents here are doing, the exercise of federal provided rights to preserve their domestic employment opportunities. Such petitioners object is sought, notwithstanding as found, that respondents do not or seek to represent, organize or support the alien seamen parties to such articles, but are solely seeking preservation in their homeland of their domestic employment opportunities. Stripped of petitioners' semantics, they seek the extraterritorial application of foreign laws to our nation, to both substitute for and negate the laws of our nation and the rights which Congress has expressly provided for American workingmen.

Petitioners position is that found in *Uravic, supra,* an attempt by a foreign flag vessel in our territorial waters to make applicable here in the United States the foreign law of the vessel's country, contrary to provisions and concepts of our laws. In response, we reiterate Mr. Justice Holmes in *Uravic, supra,* "It is always the laws of the United States that governs within the jurisdiction of the United States." So at bar. It is our nation's law—one of American workingmen's bill of rights which the American seamen are exercising here in the United States, and it is such law which governs, not Liberian law.

Contrary to petitioners and their amici suggestions, treaty provisions for access to and egress from ports of contracting parties are subject to the exercise of a nation's jurisdiction and its laws in its territory. As at bar, such access and egress to petitioners' vessels to our ports is and has been assured and not abridged, witness the vessels presence and subsequent departure. However, such freedom is patently subject and limited to the provisions and

application of our nation's laws as we see fit to exercise,[13] *Benz, supra, Cunard SS Co.* v. *Mellon,* 262 U.S. 100 (1923). And our nation has made such an exercise for our workingmen in our nation by the passage of the Act.

Our nation in promulgating labor laws and concepts contained therein, has enunciated a panoply of rights, including a bill of rights *supra,* for American workingmen. Although foreign nations and others may disagree as to the advisability of certain of such rights as well as other provisions and policies of our labor laws, as apparently petitioners do at bar, nevertheless we as a nation have made the determination and such is absolute.

A cardinal right, as we have demonstrated *supra,* is the right of American workingmen to non obstructively and peacefully by primary picketing, protest activity and conduct which depresses their employment opportunities in this country and to seek the mutual aid and assistance of their fellow workers (Section 7), to preserve such employment opportunities. This is what this case is all about and nothing more. To those who disagree with our nation's labor policy formulated by Congress, whether foreign ship owners or others, their arguments should be directed to Congress not our Courts, *McCulloch,* 372 U.S. at 22.

Nor does our national labor policy solely encompass strife between our employers and employees. Although "the Act primarily"[14] concerns such strife, *Ariadne,* 397

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[13] A most recent demonstration of our nation's exercise of our jurisdiction as to all foreign vessels access to our ports, is the enactment of the Ports and Waterways Safety Act of 1972, P.L. 92-340, 1972, 86 Stat. 424 and its Title II providing for regulation of foreign vessels entering our ports and if need be exclusion thereof, in order to protect and preserve our marine waterways and environment.

[14] Petitioners erroneously view our national labor policy as one limited to strife between employers and employees and, therefore inappositely suggest the application of inappropriate provisions of our Labor Act, a determination which Congress forebore, (Pet. Brief, ¶C, pp. 22-25).

U.S. at 198-199, it by no means is so exclusively limited. The rights provided American workingmen in the United States do not depend upon or limited solely to the relationship of employer-employee, *Sax Enterprises supra.* To the contrary, the Congressional scheme as utilized is broad, whether *inter alia,* enunciated as workingmen's rights in Section 7, or union, employee or employer unfair labor practices (rights and obligations), in Section 8 with its multiple subdivisions. Nor are many of the Act's rights and proscriptions limited to the nationality or country of origin of the employer. The criteria is whether the conduct occurring is within our territorial jurisdiction, a domestic dispute, such as at bar.

The NLRB has exercised its jurisdiction and implemented the Act's provisions where the unlawful conduct has occurred within our nation, notwithstanding the fact that the dispute was foreign and that the primary employer and its employees were foreign. *Washington-Oregon Shingle Weavers Council (Sound Shingle Co.),* 101 NLRB 1159 [1952]; *International Wood Workers of America (T. Smith & Sons, Inc.),* 125 NLRB 209 [1959].[15] Provisions of the Act and specifically Section 8(b)(4) thereof may be implemented by "any person" without regard to his na-

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[15] Amicus Mobile Steamship Association, in support of petitioners, cites a recent Alabama Supreme Court decision, *American Radio Association* v. *Mobile Steamship Association,* 279 So. 2d 467, 83 LRRM 2567, a state court case commenced by said Association, American employers, to restrain picketing of two foreign flag vessels. The trial court granted a preliminary injunction without findings. Upon appeal therefrom to the Alabama Supreme Court, the appellants *inter alia,* raised such failure of findings. In response, the Court held: "But apparently the trial judge found from the evidence that there was wrongful interference by the appellants with the appellees' business, *for otherwise he would not have ordered the temporary injunction to issue",* (emphasis supplied). It appears to us such conclusion is substantial error particularly where, as there, serious challenge upon appeal was made to the absence of findings,

tionality, under the Act's Section 10(b). And, of course, "whosoever shall be injured", again without regard to nationality, may sue pursuant to the Act's Section 303 for damages as a consequence of an unfair labor practice provided for in the Act's Section 8(b)(4). The sole implementing criteria is the conduct occurring within our jurisdiction. In fact, as the record at bar demonstrates, one of the petitioners invoked the Act's provisions, filed unfair labor practice charges with the NLRB alleging a Section 8(b)(4) violation and ten days thereafter, voluntarily withdrew the same.

The foregoing we submit, demonstrates conclusively that the Act's provisions are not inapplicable merely because the dispute involves a foreign national. On the contrary, if the dispute is domestic such as at bar, where American workers are seeking to preserve employment opportunities here, the right provided by the Act to attain such objective, is patently applicable. Such is wholly different from the activity present in the trilogy aforesaid, where the Act's provisions were sought to be applied to the regulation of the internal affairs of a foreign vessel and subject it to American (NLRB) administrative regulation and determination. No such regulation or application of the Act's provisions are sought, required or opted for at bar. What respondents do seek, is to prevent

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the substantive testimony, its full purport, authority and weight. Present therein are issues of federal preemption and deprivation of freedom of speech in violation of the First and Fourteenth Amendments. Notwithstanding that plaintiffs there were not the two foreign flag vessels but American employers claiming interference with their American business by reason of the picketing of a foreign flag vessel and the decisions in, *Madden* v. *Grain Elevator Workers Local 418*, 334 F. 2d 1014, 1019 (7 Cir.), cert. den. 379 U.S. 967 and *Grain Elevator Workers Local 418* v. *NLRB*, 376 F. 2d 774, 776 (D. C. Cir.) cert. den. 389 U.S. 932, holding such complaint preempted by the Act, the Alabama Supreme Court nevertheless affirmed the assumption of jurisdiction. The time to file a petition for writ of certiorari to the United States Supreme Court has not run.

petitioners from vitiating and frustrating the implementation of their fundamental right which Congress granted to American workingmen here in our nation.[16]

5. Federal labor policy is manifest in labor statutes, not in statutes whose concern and purpose is directed to other national policies and objectives.

Petitioners argue for an exception to the exercise of Section 7 rights, so as to exclude from its coverage, American seamen workingmen notwithstanding Section's 7 pervasive and all encompassing language, (Pet. Brief, ¶ B pp. 19-22). The premise for the exception, is the passage of the Merchant Marine Act of 1970 P. L. 91-469, 84 Stat. 1018 (1970), 46 U.S.C. 1101 *et seq.* Such contention, totalling lacking in merit or authority, is at best fanciful.

The latter Act's specific policy declaration makes clear the Congressional and national purposes of said Act, to wit, "the fostering, development and maintenance of a merchant marine"; (Section 1101). It does not purport, let alone actually regulate or seek to regulate, national labor policy or any part thereof, including the establishment,

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[16] We note in the joint brief of amici *West Gulf Maritime Association, Inc.* and other Associations representatives, domestic entities, filed in support of petitioners, that the constituencies thereof includes, "owners and/or operators of foreign flags", (p. 2, their Brief) and presumably petitioners herein, as witness on said page 2, their representation that, "virtually all owners * * * of vessels * * * calling * * * at Houston, etc." are members of said Association. The incidents at bar occurred at Houston, (see also fn. (5) supra). As such domestic association members, they are subject to and the beneficiaries of American laws including our labor laws. It is anomalous, if not ironic, that notwithstanding such beneficence to them of American law, they can merely change their "proverbial hats" when it suits them to become foreign flag operators, not subject to the obligations of the same laws and simultaneously seek to frustrate the utilization and exercise by American workingmen of federal rights, such as they are attempting at hand. As to their further unfounded lament as to alleged financial dire consequences, such should be directed to bodies other than this Court, *McCulloch,* 372 U. S. at 22.

administration and regulation of the rights of any American workingman. Such Marine Act's legislative history and its results do not even remotely manifest a consideration by Congress of labor policy, its administration and regulation. The hallmark of "labor legislation", represents an overwhelming volume of Congressional debate, exhaustive examination of views of diverse and antagonistic political and economic interests distilled into the final product, as witness the Taft-Hartley Act, its predecessor the Wagner Act, and the subsequent Landrum-Griffin Act. The foregoing Marine Act is devoid of any such labor policy treatment, let alone a modicum thereof. Petitioners endeavor to utilize the Marine Act to decimate the exercise of long established federally enacted rights by American seamen (Section 7), would lead to chaos and frustration of established labor policy. The impact of such contention as opted for by petitioners, would be disastrous and diametrically opposite to national labor policy and its administration.

Petitioners endeavor here is not novel. Analogous endeavor has recently been attempted by those allied with petitioners and rebuffed in *Port of Houston Authority supra,* 456 F. 2d at 53. There, exception was sought from the proscriptions of the Norris-LaGuardia Act on the alleged ground, "for protecting foreign commerce with friendly nations on the basis of underlying treaties". The Circuit there unanimously rejected the request and this Court denied certiorari, *supra.*

American workingmen have enjoyed Section 7 federal protected rights underlying the right to picket and protest as at bar, for more than a quarter of a century, *Garner supra.* Suggestions or arguments to deprive all or any American workingman of any of such rights should be directed to Congress, not the Courts, *McCulloch,* 372 U.S. at 22, *Port of Houston Authority,* 456 F. 2d. at 53. Nor

can these federal statutory rights be repealed by implication through the device of the Marine Act, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968); *W. L. Mead* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 25*, 217 F. 2d. 6, 9 (1 Cir.).

II.

The Texas State Courts Inter Alia, Properly Applied the Garmon "Arguably Protected" Rule.

The Texas Courts found *supra*, that respondents activities (Section 7), upon decisional law, indicated that it is actually protected under the Act and that at least is arguably protected, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), (A. 138). Paramount, is that this Court has found conduct such as at hand, to be actually protected by Section 7, *Garner supra, Ariadne supra*, Mr. Justice White concurring opinion. Nevertheless petitioners argue (Pet. Brief, ¶ III), *Garmon* is inapplicable because first, the Act is inapplicable to internal affairs disputes of foreign vessels and second, opinions of some individual Justices of this Court, "appear to disapprove the 'arguably' rule as such" (Pet. Brief, pp. 27, 28).[17] However, after expressing accord with such disapproval of the *Garmon* rule, they proclaim to limit their argument directed to their disapproval of the *Garmon* rule concept to the facts in issue at bar, (Pet. Brief, p. 28). We shall discuss petitioners both arguments.

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[17] In *Amalgamated Ass'n. of Street Car Employees etc.* v. *Lockridge*, 403 U.S. 274 (1971), one of the dissenting opinions referred to by petitioners, there the preemption issue as distinguished from the facts in the case at bar, arose in the context of an action commenced by a member against his union.

1. There is no internal affairs dispute and the Act is not limited solely to disputes between American employers and their American employees. Central to the Act are Section 7 rights. The exercise of such rights in the United States by American workmen to protest the loss and seek preservation of domestic employment opportunities, constitutes activities highly to and actually central to the Act's purposes, object and scheme.

Petitioners declare as fact and law, that the Act is concerned with American employers and their disputes with American employees but then state, assuming arguendo foreign ships and foreign seamen are subject to regulation by the Act, the *Garmon's* rule premises for NLRB preemption, the averting of state interference with national labor policy, would not exist here,[18] because their argument goes, "such regulation (is not) of industrial strife between American employers and American employees with which the Labor Act and national labor policy is concerned," consequently "not central" to the Act and thus should be subject to state regulation (Pet. Brief, pp. 28, 29).

Petitioners fail to recognize that the Act's scope is not exclusively the regulation of disputes between an American employer and its employees. The Act, as this Court has declared, "primarily concerns," such disputes, *Ariadne,* 397 U.S. at 198, 199. However, primacy is not exclusivity. As *Benz* and *McCulloch supra,* conclusively inform, the Act created a "bill of rights" for American workingmen. Central to such bill of rights is the actual protected right of American workingmen to lawfully engage in primary picketing and other publicizing to preserve their employment opportunities here in the United States (*Garner supra*) and lawfully seek to obtain the mutual aid and assistance of fellow workmen as at bar (Section 7). Such

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[18] The *Garmon* rule precept is to avert all interference with national policy and exclusive competence of the NLRB whether such interference is by state or federal authorities.

right and its exercise is both actually *supra*, and arguably (*Garmon supra*) protected.

Petitioners in addition to their expressed disapproval of the *Garmon* rule, finally argue for a special non-preemption rule for foreign vessels within our jurisdiction, a result sought tantamount to special legislative action (Pet. Brief, p. 29). Such argument we respectfully submit requires but summary treatment and reply to wit; respondents activities constitute actual exercise of federal provided rights, *Garner supra* and foreign vessels within our territory are subject to our laws *Uravic supra*. Petitioners argument aforesaid should be directed to Congress.

2. The challenge to the Garmon rule is unfounded and inappropriate.

Petitioners argue that the policy consideration underlying the *Garmon* "arguably protected" rule, precluding interference by other authorities, with primacy to the NLRB, does not exist with respect to a foreign vessel, assuming arguendo, the Act's applicability and Board inquiry into and regulation of such vessel's labor relations. Their alleged reasons,—the Act and national labor policy is concerned with industrial strife between American employers and American employees. We have shown *supra*, that petitioners misconceive the facts and issue at bar,—the distinction on the one hand of the conduct in the trilogy aforesaid which petitioners constantly opine is that at bar, notwithstanding no such findings below but on the contrary its rejection, and on the other hand, respondents actual conduct as found by all the Courts below to wit, it is for preservation of employment opportunities in the United States, conduct less than that in *Ariadne*.[19]

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[19] In *Ariadne* some of the foreign flag vessels crews performed the longshoremens' work and which employment by the vessel was sought by the longshoremen. Respondents here want no employment of any kind by the vessel.

Central to the regulation of the rights under the Act, including respondents right and exercise as aforesaid, are the preemption and primacy policy considerations. Petitioners submit no substantive argument for their stated accord with individual Justices opinions which they enumerate,[20] and which to them, appear to disapprove the "arguably rule as such" (Pet. Brief, p. 28). Lest we not be foreclosed in the event this Court determines to pass upon petitioners observations and their accord with such observations, we set forth our fundamental argument in support of the *Garmon* rule, without reference to the merits of the rule, other than to state we are in accord with the underlying policy considerations for the rule.

The *Garmon* arguably protected rule has constituted the law, and an integral part of our national labor policy, its administration and enforcement for almost 15 years since this Court's decision in early 1959. Suffice it to state, Congress, the American workingmen, their unions, American employers and other persons doing business in our nation as well as others, and all Courts both state and federal, recognize the *Garmon* holding, its thrust and purport, notwithstanding upon occasion resort may be had to limited reinstruction to state authorities as to its dictates. For the judiciary to now change the rule, would do injury and harm to long established and solemn principles hereafter illustrated.

It is academic to state, that Congress constitutes the source for the establishment, modification and repeal of federal legislation and the rights and obligations embodied. Regarding labor legislation, our history demonstrates conclusively, that in such field some of the most intensive and fierce legislative debates occur, for they are the manifestations of sincere and deeply held views of powerful and widespread forces in our society, with multiple conceptions. Attempts to legislate in this field, are long and bitter and

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[20] Pet. Brief, p. 28.

generally represent compromise of views, distillation after long and arduous compaigning, lobbying, propagandizing but most important, ultimate legislative determination. The arduousness of the task is made manifestly more difficult because the ultimate legislation enacted, uniquely as distinguished from most other legislation, affects an overwhelming number of our citizens and their families economic and social well being. It constitutes an intergral fabric of our peoples concerns.

In recognition of the foregoing, we most respectfully submit, that change if any in the "rules of the game" of labor relations, should reside solely with the legislature. Evermore so is that imperative, where the rule sought to be changed has in fact been called to Congresses attention and they have opted not for change, but for the pursuit of a different remedy. Legislative debate demonstrates such history applicable to the "*Garmon* arguably protected rule".

The most recent attempt by Congress to deal comprehensively with labor legislation resulted in the Act as amended in the fall of 1959. Its legislative genesis commenced prior, in 1958.[21] A vexatious issue which Congress faced, was whether legislation was appropriate to regulate what to then was the right of a labor union to picket an employer's establishment for its recognition as the collective bargaining representative of the employer's employees, without the requirement for an NLRB election. During the debate, this Court decided *Garmon*. Shortly thereafter concerning debate on the aforesaid issue, Sen. Mundt [22] in support of legislation to regulate such recognition picket-

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[21] References are to Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, consisting of two volumes prepared and published by the National Labor Relation-Board and referred to volume number and pages thereof. Leg. Hist. Vol. II p. 968, January 20, 1959, Cong. Record p. 816, Senate.

[22] Leg. Hist. Vol. II p. 1180, April 24, 1959, Cong. Record p. 5957, Senate.

ing, pointed out to the Senate that the *Garmon* rule (arguably protected), precluded state courts from exercising jurisdiction over conduct such as recognition picketing. Most significant and notwithstanding the clear reach of the *Garmon* rule and Sen. Mundt's exhortations as to its impact, Congress nevertheless over the next several months until the Bill's enactment in the fall of 1959, took no action to legislatively negate or modify the *Garmon* rule and its impact.[23] On the contrary, a selected approach was utilized. Where activities which pursuant to *Garmon* were arguably protected, but which Congress determined warranted regulation, it amended and regulated the activities (Section 8(b)(7)). However, as to other activities equally "arguably protected" but which Congress determined warranted no regulation or further regulation, it left the same undisturbed.

As contrasted to the foregoing treatment by Congress of the impact of Court decisions in the labor field, is that which Congress accorded to *Guss* v. *Utah Labor Relations Board,* 353 U.S. 1 (1957). There, the Court found that states were without jurisdiction to intervene in labor disputes where the NLRB, possessed of jurisdiction, nevertheless refused as legislatively authorized to assert its jurisdiction, creating what has been referred to as a "no man's land". Congress there moved directly to the issue presented by the Court's decision and made the change which now constitutes the Act's Section 14(c). Significantly, no such treatment was accorded by Congress to *Garmon.* To the contrary as shown supra, a selective approach was employed.

We here reiterate our submission. Change or modification of labor legislation and the rules fashioned therefor

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[23] Further Congressional knowledge of the impact of the *Garmon* rule and the suggestions for appropriate modification of the arguably protected rule during the debate on amendments to the Act, are the extension of remarks and insertions in the Congressional Record Appendix, of authorities used by Cong. Whitener, Leg. Hist. Vol. II p. 1766-1768, Cong. Record A 6371-6387.

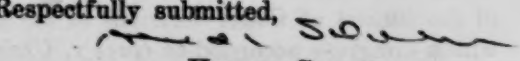
should emanate from Congress. Particularly so where as here, the subject involved is of long tenure with regulation and administration thereunder a fabric of our national labor policy and where Congress at the time of legislating upon labor legislation was aware of the rule, its attention directed to the rule, but nevertheless did not see fit to repeal the rule and instead exercised a selective approach and legislated such changes which it deemed appropriate.

CONCLUSION

The Judgment of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas Should Be Affirmed.[24]

Dated: September 26, 1973.

Respectfully submitted,



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New York, N. Y.

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[24] Respondents upon trial, defended against petitioners injunction petition raising *inter alia*, the defense that their peaceful and non obstructive picketing upon public docks or with the owners consent, publicizing the loss of their job opportunities here in the United States by reason of the foreign flag's vessels substandard wages and working conditions, constituted exercise of freedom of speech, protected by the First and Fourteenth Amendments. The Courts below found respondents conduct preempted and immune from state restraint and found unnecessary, the determination of such constitutional issue. By reason thereof and by virtue of the fact that respondents have no reason to believe that Texas Courts would not give observance to respondents constitutional rights, respondents have not briefed or argued such constitutional rights issues.

APPENDIX

§ 157. Right of Employees as to Organization, Collective Bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership

therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmerbership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of

this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discrminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry effecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object there is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such

employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discrminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for service which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer

where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing to induce any individual employed by any

other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor parctice under this subsection.

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Concilation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in the contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 15-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not

established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title. July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub. L. 86-257, Title II, § 201(e), Title VII §§ 704(a)-(c), 705(a), 73 Stat. 525, 542, 545.

No. 72-1061

Supreme Court of the United States

OCTOBER TERM, 1973

WINDWARD SHIPPING (LONDON) LIMITED, et al.,
Petitioners

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS,
FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the position of the respondent unions, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 113 national and international labor unions, having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

STATEMENT OF THE CASE

The basic facts, as found by the court below, on the basis

of "stipulation or uncontroverted evidence" (A. 126), are as follows:

> "Four pickets [American-seamen-members of six American maritime unions] commenced picketing the Theomana [a cargo ship of Liberian registry] at the Port of Houston on October 28, 1971, and four began picketing the Northwind, [also of Liberian registry] the following day.
>
> Signs carried by the pickets bore the following message:
>
> 'ATTENTION TO THE PUBLIC
>
> The wages and benefits paid seamen aboard the vessel THEOMANA (NORTHWIND) are substandard to those of American seamen. This results in extreme damage to our wage standards and loss of our jobs. Please do not patronize this vessel. Help the American seamen. We have no dispute with any other vessel on this site.' (Parenthesis added).
>
> The signs bore the names of the picketing unions.* * * Longshoremen and other workmen would not cross these picket lines to service [the] vessels.
>
> * * *
>
> "The crews and officers of the vessels are foreign nationals. There is no labor dispute between the owners of the vessels and their crews or the foreign unions who represent them or on the foreign contracts under which they work. The picketing unions neither have nor claim the right to represent the crews, nor do they seek to obtain such right. None of the crew members are members of the picketing unions. The picketing has been peaceful and without violence or threat of violence.
>
> * * *
>
> "[The unions] picketed only when the vessels of the * * * primary employers, were dockside. Secondly, when picketed the ships were being loaded and un-

loaded, part of the usual operation of cargo ships and the normal business of the primary employers. Moreover, the picketing was limited to the dock at which the vessels were berthed. Further, the signs carried by the picketers clearly restricted the picketing to the primary employer. And, the two ships were the only reasonably accessible places of business to which the unions could direct their attention and efforts." A. 125-127, 130-131.

Thus, as the Texas courts recognized, the economic weapon employed here was peaceful, primary, non-recognitional, area standards picketing.[1]

ARGUMENT

The question presented is whether the legality of the Unions' picketing of the Theomana and the Northwind (described above) is to be determined on the basis of the provisions of the National Labor Relations Act, as amended, 29 USC §151 *et seq*, or on the basis of the law of Texas. The Texas courts held that the NLRA controls. A. 125-139. That holding is correct—as we now demonstrate.

1. It simplifies and sharpens analysis to first consider whether the NLRA governs the type of picketing here involved so as to exclude state law when directed at an

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[1] In determining whether the picketing was "primary" or "secondary" the court below applied the "guidelines for permissible picketing on the premises of a secondary employer promulgated in Sailor's Union of the Pacific, 92 N.L.R.B. 547 and adopted in Local 761, Inter. U. of E., R. and M. Wkrs. v. NLRB, 366 U.S. 667 (1961)." A. 130. As the above quoted passage shows, it found a lack of recognitional object as a matter of fact. And that court denominated the picketing as "area standards" on the basis of *Longshoremen* v. *Ariadne Co.*, 397 U.S. 195. A. 131-132.

American-flag vessel paying substandard wages—a vessel which, in contrast to those flying a foreign flag, is concededly an "employer" in "commerce" as those terms are defined in §§2(2)[2] & (6)[3] of the Act.

"Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see American Steel Foundries v. Tri-City Cen. Trades Council, 257 U.S. 184, 209, * * * an elimination of price competition based on differences in labor standards is the objective of any national labor organization." *Apex Hoisery Co.* v. *Leader*, 310 U.S. 469, 504. This economic imperative has impelled organized workers to protect the terms and conditions of employment they have won from their own employers, where other alternatives have failed, by peaceful picketing directed at substandard employers and seeking to persuade those who would deal with the

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[2] "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

[3] "The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

latter not to do so. See, e.g., *Senn v. Tile Layers*, 301 U.S. 468; *Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308.

Such picketing when carried on by "employees," as that term is defined in §2(3)[4] of the Act, through their "labor organization," as that term is defined in §2(5)[5], and within the limits set by §8(b), is a paradigm expression of the §7 "right to * * * assist labor organizations to engage in other connected activity for the purpose of * * * mutual aid and protection;" and it is protected by §13, in which Congress "made it clear that * * * all * * * parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike [and picket, *NLRB* v. *Drivers Local Union*, 362 U.S. 274, 281,

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[4] "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

[5] "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers covering grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

n.9] may be so read only if such interference, impediment, or diminution is 'specifically provided for' in the Act" (*NLRB* v. *International Rice Milling Co.*, 341 U.S. 665, 673). As stated in *Garner* v. *Teamsters*, 346 U.S. 485, a case in which organized employees, acting through their union, picketed an unorganized employer in an effort to have that employer's employees join the union "to gain union wages, hours and working conditions" (*id.* at 486-487), the "policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing" (*id.* at 499-500).

To be sure, §8(b) imposes substantial, albeit carefully limited, restrictions on the right of covered employees and their unions to picket the competitors of their employers. Section 8(b)(4)(B) prohibits "secondary activity," as that complex concept is defined by federal law (see n. 1, p. 3 *supra*). And, §§8(b)(4)(A),(B) & (C) and §8(b)(7) place stringent limitations on the right to engage in organizational picketing. But the Act does sanction primary picketing by such employees acting through their unions directed at competitors of their employers, where the object is to require the picketed employer "to conform [his] standards of employment to those prevailing in the area," so long as they do "not, in [their] conversation with the [picketed employer, their] letter[s] to [that employer], or [their] picket sign, claim to represent [his] employees, request recognition by [him], or solicit [his] employees to become [union] members." *Houston Bldg. and Const. Trades Council (Claude Everett Const. Co.)*, 136 NLRB 321, 323.

As this Court stated in *Teamsters Union* v. *Morton*, 377 U.S. 252, 259-260, where it held that the states could not utilize their own secondary boycott law to condemn union requests to an employer to cease doing business with another employer with whom the union had a dispute, since that conduct was lawful under the Act:

> "This weapon of self-help, permitted by federal law, formed an integral part of the [union's] effort to achieve its bargaining goals * * * Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. Electrical Workers Local 761 v Labor Board, 366 US 667, 672, * * * If the [state] law * * * can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe * * * the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national policy. 'For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' Garner v Teamsters Union, 346 U.S. 485, 500."

Morton's rationale compels the conclusion that the states may not utilize their own law to interdict peaceful, primary, non-recognitional, area standards picketing by American seamen acting through their unions directed at an American-flag vessel paying substandard wages. Congress in enacting the NLRA, "focused upon" the right to engage in such picketing "but did not proscribe" it. And utilization of "this weapon of self-help, permitted by federal law," is "an integral part" of efforts to maintain

established conditions and to achieve future "bargaining goals." To allow state law "to proscribe the same type of conduct" would "frustrate the Congressional determination to leave this weapon of self-help available." 377 U.S. at 259-260. In sum, such picketing creates a "labor dispute"[6] which is regulated by the Act.

2. Against this background we turn to the question of whether peaceful, primary, non-recognitional, area standards picketing by American seamen acting through their unions directed at a foreign-flag vessel paying substandard wages likewise creates a labor dispute which is regulated by the NLRA.

(a) The Act does not regulate labor disputes between employers whom it does not cover and their own employees. Recognition or bargaining disputes between the United States, a State, a non-profit hospital, an employer covered by the Railway Labor Act, an agricultural employer, or an employer not in commerce, are not for the NLRB to decide. See §§2(2) & (6) of the Act. In *Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138, *McCulloch* v. *Marineros de Honduras,* 372 U.S. 10, and *Incres Steamship Co.* v. *Maritime Workers Union,* 372 U.S. 24, this Court "concluded that maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of §2(6)" of the

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[6] Under §(2)(9) of the NLRA:

"The term 'labor dispute' includes any controversary concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

Act *(Incres,* 372 U.S. at 27). From that conclusion, and the general principle just noted, it followed, as the Court held, that questions concerning the representation of the crews of such vessels for the purposes of collective bargaining are not within the NLRB's jurisdiction, whether they arise by reason of a petition under §9 for a Board-conducted election, or by reason of an organizing campaign carried on through recognitional or organizational picketing *(McCulloch* and *Incres)*; and, by the same token, that strikes and picketing by alien seamen over their own terms and conditions of employment are not regulated by §§7 & 8 of the Act *(Benz)*. Nor, as all three cases make clear, is the coverage of the NLRA expanded if American unions seek to act as the collective bargaining representative of the alien seamen, or are in fact designated by those seamen as their representative. Thus, the holdings of *Benz, McCulloch* and *Incres* are precisely the same as those which would have resulted in a case arising out of a labor dispute between a domestic employer not covered by the Act and his own employees.

(b) The general rule that the NLRA does not regulate labor disputes between a non-covered employer and his own employees does not mean that the Act has nothing to say with regard to a labor dispute between, on the one hand, covered employees and their unions and a non-covered employer on the other. There are a variety of situations in which, although the employer is not covered by the NLRA, a labor dispute in which he is involved, is regulated by the Act, because the dispute is precipitated by concerted activity by employees of a covered employer acting through a "labor organization," within the meaning of §2(5). Thus, for example, the reach of the NLRA law regarding "sec-

ondary" activity is determined by the identity of the employees and their union and does not turn on whether the complaining employer is covered by the Act. Compare *Teamsters Union* v. *New York N.H. & H.R. Co.*, 350 U.S. 155 (picketing of a non-covered employer (a railroad) governed by the NLRA because the concerted activity is by covered employees and their union), with *DiGiorgio Fruit Co.* v. *NLRB*, 191 F.2d 642 (C.A.D.C.) cert. denied 342 U.S. 869 (picketing of a covered employer not governed by the NLRA because the concerted activity is by a union of non-covered employees). More generally, the protections §7 affords workers, who are employees within §2(3) because of the status of their employer, apply even if the employer against whom they take concerted action is not covered by the Act. For, as Judge Learned Hand explained:

> "It is of course true that only those "employees" can invoke §7, who are defined by §2(3) * * * It follows that, so far as the * * * 'concerted activity' [was] for the 'mutual aid or protection' of farmers [not covered by the NLRA] on the one hand and the members of [the union of covered employers who undertook the activity] on the other, the section did not cover it. So far, however, as it was a 'concerted activity for the purpose' of the 'mutual aid or protection' of the members of [the union of covered employers who undertook the activity] themselves, the section did cover it, though perhaps the more accurate word in that situation would have been 'common' instead of 'mutual.' Certainly nothing elsewhere in the act limits the scope of the language to 'activities' designed to benefit other 'employees'; and its rationale forbids such a limitation. When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his

support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts. * * * It is one thing how far a community should allow such power to grow; but, whatever may be the proper place to check it, each separate extension is certainly a step in 'mutual aid or protection.' Cf. Fort Wayne Corrugated Paper Co. v. National Labor Relation Board, 7 Cir., 111 F.2d 869, 873, 874. It is true that in the past courts often failed to recognize the interest which each might have in a solidarity so obtained (e. g. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 471, 472, 474) but it seems to us that the act has put an end to this." *NLRB* v. *Peter C. K. Swiss Chocolate Co.*, 130 F.2d 503, 505-506 (C.A.2).

In other words, §7 applies to concerted activity by covered employees the object of which is to enhance those employees' ability to secure improved terms and conditions from their own employers. That, of course, is the precise and only object of peaceful, primary, non-recognitional, area standards picketing. See pp. 3-8 *supra*. Indeed, it would be contrary to the logic and purposes of the Act, as well as the plain language of §7, to conclude that while Congress has granted covered employees the right to engage in such picketing against substandard employers also covered by the NLRA, it has denied those employees the right to engage in such picketing against non-covered substandard employers. The threat to the interests of covered em-

ployees posed by both classes of employers is precisely the same. The permission acknowledgely granted, reflects a Congressional determination that the interests of the picketing employees outweigh those of the picketed employer and his employees. And there is nothing to show that the countervailing interests of substandard employers not covered by the Act and their employees are more substantial than those of substandard employers and their employees who are covered.

(c) The lesson of the foregoing is that, as a general proposition, peaceful, primary, non-recognitional, area standards picketing by covered employees and their unions directed at a non-covered employer, creates a labor dispute governed by the NLRA; and, that such picketing is a "weapon of self-help, permitted by federal law" which state law can not "proscribe" (*Morton,* 377 U.S. at 259). The issue narrows, therefore, to whether the general rule is inapplicable where the picketed employer is not in commerce under the holding in *Benz* and the picketing is conducted by American seamen through their unions.

In approaching this issue we begin from the knowledge that *Benz, McCulloch,* and *Incres* do not mean that the NLRA is inapplicable simply because a foreign-flag vessel becomes involved in a domestic labor dispute precipitated by the efforts of covered American employees and their unions to protect their established terms and conditions of employment with American employers also covered by the Act. The Act does govern "peaceful picketing protesting substandard wages paid by foreign-flag vessels to American longshoremen working in American ports." *Longshore-*

men v. *Ariadne Co.*, 397 U.S. 195, 196. For, as the Court there explained, such a

> "dispute center[s] on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but rather to do casual longshore work. There is no evidence that these occasional workers were involved in any internal affairs of either ship which would be governed by foreign law. They were American residents, hired to work exclusively on American docks as longshoremen, not as seamen on [foreign-flag] vessels." *Id.* at 199-200, footnote omitted.

This Court's opinion in *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U.S. 365, which involved precisely the concerted activity employed here (*id.* at 367-368), squarely holds that the controversy thus precipitated is a "labor dispute" within the meaning of the Norris-LaGuardia Act, 29 U.S.C. §101 *et seq* (*id.* at 370). The definition of labor dispute in §2(9) of the NLRA is identical to that contained in §13 of Norris-LaGuardia. And in *Marine Cooks*, the Court went on to explain why such a labor dispute is "domestic," rather than (as in *Benz*) one which "interfere[s] in the internal economy of a vessel registered under the flag of a friendly foreign power:"

> "Unlike the situation in the Benz Case, in which American unions to which the foreign seamen did not belong picketed the foreign ship in sympathy with the strike of the foreign seamen aboard, the union members here were not interested in the internal economy of the ship, but rather were interested in preserving job opportunities for themselves in this country. They were picketing on their own behalf, not on behalf of the

foreign employees as in Benz. Though the employer here was foreign, the dispute was domestic." 362 U.S. at 371 & n. 12.

In *Benz, McCulloch* and *Incres,* this Court declined to read American law so expansively as to grant the NLRB "jurisdiction * * * over labor relations already governed by foreign law," viz., the labor relations between a foreign-flag vessel and its alien crew. *Ariadne,* 397 U.S. at 199. In support of that construction of the Act, the Court emphasized that the Congressional intent in passing the NLRA was to protect American workers and not to enhance the rights of alien seamen:

> "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. * * * The Report made to the House by its Committee on Education and Labor and presented by the coauthor of the bill, Chairman Hartley, stated that 'the bill herewith reported has been formulated as a bill of rights both for *American* workingmen and for their employers.' The report declares further that because of the inadequacies of legislation 'the *American* workingman has been deprived of his dignity as an individual,' and that it is the purpose of the bill to correct these inadequacies. (Emphasis added.) HR Rep No. 245, 80th Cong, 1st Sess 4. What was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." *Benz,* 353 U.S. at 143-144, quoted and followed in *McCulloch,* 372 U.S. at 18-20.

Consistant with that emphasis, the Court in *Marine Cooks* and in *Ariadne* declined to read American law so narrowly as to deprive American workers, in job competi-

tion or otherwise affected by the labor policies of a foreign-flag vessel, of the rights enjoyed by all other American workers covered by the same protective provisions. And, just as it is true that there were "no discussion in either House of Congress * * * indicat[ing] in the least that Congress intended the coverage of the Act to extend to circumstances such as those posed [in Benz]" (355 U.S. at 143), there is nothing in that legislative history, or in the language or structure of the NLRA to indicate that Congress intended to deprive covered American seamen and their unions of the right, essential in combating substandard competition, to engage in peaceful, primary, non-recognitional, area standard picketing, granted to the balance of American "employees" and "labor organizations" defined by §§2(3) & (5) of the Act.

3. The petitioners invite this Court to reconsider its holding in *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 245, that "When an activity is arguably subject to §7 or §8 of the Act, the States * * * must defer to the exclusive competence of the National Labor Relations Board." Pet. Br. pp. 27-29. There is no occasion to do so.

The major issue in this proceeding is whether the picketing which occurred here precipitated a labor dispute covered by the NLRA. In that respect the problem presented is exactly parallel to that the Court confronted in the *Ariadne* case. In *Ariadne* the Court itself determined that the NLRA governed; it did not withhold final resolution of that question of coverage pending a determination by the NLRB. 397 U.S. at 198-200. In light of the Court's approach in *Ariadne,* we have argued in this case, that this labor dispute *is* covered by the NLRA, and not that it is "argu-

ably" subject to that Act. Once it is determined that this dispute is regulated by the Act, there can be no doubt that concurrent state regulation based on the theory that union action which tends to interfere with contractual relationships is a tort (see A. 128), would "upset the balance of power between labor and management expressed in our national policy" (*Morton*, 377 U.S. at 260). Accordingly, as recognized in *Ariadne* (in the majority opinion on the authority of *Garmon*, 397 U.S. at 200-201, in the concurrence on the authority of *Garner*, *id.* at 207-202), the states are without jurisdiction over the controversy.[7]

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[7] The Petitioners have made no claim here that the picketing was violent, obstructive, that it constituted a trespass, or pointed to any other factor "touching interests * * * deeply rooted in local feeling and responsibility." *Garmon*, 359 U.S. at 244; cf., *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223.

CONCLUSION

For the above noted reasons, as well as those stated in the brief of the respondent unions, the judgment below should be affirmed.

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September, 1973

IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1061

WINDWARD SHIPPING (LONDON) LIMITED, *et al.*,
Petitioners,

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,
Respondents.

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents seek to distinguish the case at bar from *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138 (1957) and *Incres Steamship Co.* v. *International Maritime Workers Union,* 372 U. S. 24 (1963) on the ground that the picketing here was neither in aid of a shipboard dispute nor in aid of efforts to represent foreign seamen. They argue on the basis of *International Longshoremen's Association, Local 1416, AFL-CIO* v. *Ariadne Shipping Co.,* 397 U. S. 195 (1970) that so-called "area standards" picketing to protest allegedly substandard wages is protected or arguably protected by Section 7 of the Labor Act, 29 U. S. C. §157.

At pages 15-17 the Brief for the Petitioners points out that any doubt remaining after *Benz* and *Incres* about the status of so-called "area standards" picketing directed at foreign ships was removed by *Ariadne.* The issue in

Ariadne was whether the Labor Act "pre-empts state jurisdiction to enjoin peaceful picketing protesting substandard wages paid by foreign-flag vessels to American longshoremen working in American ports." 397 U. S. at 196.

In seeking to resolve this issue, this Court described the determinative test as follows: "The critical inquiry then is whether the longshore activities of such American residents [the longshoremen] were within the 'maritime operations of foreign-flag ships' which *McCulloch* [v. *Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10 (1963)], *Incres,* and *Benz* found to be beyond the scope of the Act." *Id.* at 200. Applying this test the court held in *Ariadne* that state court jurisdiction to enjoin picketing in a dispute centering on the wages of longshoremen performing shoreside work was pre-empted. The opinion of the Court distinguished this picketing from picketing in a dispute directed at the wages of seamen doing shipboard work and left open the question of whether picketing in a dispute concerning shoreside work carried out entirely by crew members pursuant to foreign ship's articles would be governed by the Labor Act. *Id.* at 199, 200.

The test for determining whether state jurisdiction over "area standards" picketing of foreign-flag ships is preempted was thus clearly stated in *Ariadne.* Applying this test to the case at bar, the "critical inquiry" is whether the activities of the employees whose wages were the subject of Respondents' picketing were within the maritime operations of foreign-flag ships. The picketing here was to protest allegedly substandard wages of foreign crews serving under foreign articles on foreign-flag ships, and, as it had nothing to do with the carrying on of any shoreside activities by these crews (the question left open by *Ariadne*), the answer to the inquiry is clear. The dispute relates to activities within the maritime oper-

ations of foreign-flag ships and is thus not governed by the Labor Act.

Respondents cite *Marine Cooks and Stewards* v. *Panama S. S. Co.*, 362 U. S. 365 (1960), for the proposition that the dispute in the case a bar is "domestic" and that it therefore comes within the jurisdiction of the NLRB. As we pointed out at pages 18-20 of our Petition for a Writ of Certiorari, *Marine Cooks* was concerned solely with whether federal courts have jurisdiction to grant injunctions in spite of the prohibitions of the Norris-LaGuardia Act, 29 U. S. C. §101 et seq. It was not concerned with the applicability of the Labor Act. While there is dictum in footnote 12 of *Marine Cooks*, 362 U. S. at 371 n. 12, which characterizes the dispute in that case as domestic, this characterization has no bearing on the applicability of the Labor Act.* The determinative test of Labor Act applicability in cases involving "area standards" picketing is set forth in the later *Ariadne* case.

The *amicus* brief filed on behalf of the American Federation of Labor and Congress of Industrial Organizations seeks on pages 8-12 to draw an analogy between the issue at bar and "area standards" picketing of a domestic employer excluded from the coverage of the Labor Act by that Act's definition of employer, 29 U. S. C. §152 (2). We do not believe that such an analogy is apt, for other considerations may apply where both parties are subject to domestic regulation of their labor affairs than are present in the instant case where international considerations are an important factor. In any event, we would not accept the contention at page 9 of the *amicus* brief that there are "a variety of situations" in which a labor

* If such a characterization were relevant to the applicability of the Labor Act, we would respectfully submit that a dispute between the owner of a foreign-flag ship engaged in international trade and an American union over allegedly substandard wages of the ship's foreign crew is international as regards the parties to the dispute and foreign as regards the subject matter of the dispute.

dispute between an excluded domestic employer and a union of covered employees is governed by the Labor Act. The only situations where this holds true are those in which the dispute is "in no way concerned with [the excluded employer's] labor policy," *Teamsters Union* v. *New York, N. H. & H. R. Co.*, 350 U. S. 155, 160 (1956).

Certainly *NLRB* v. *Peter C. K. Swiss Choc. Co.*, 130 F. 2d 503 (2d Cir. 1942), noted at pages 10-11 of the *amicus* brief, does not support the conclusion for which it is cited, namely, that the protections of Section 7 apply to concerted activity directed against an excluded employer. That case involved the dismissal of an employee for publishing an article critical of his employer who was an "employer" within the meaning of the Labor Act.

Finally, as urged at pages 17-27 of the Brief for the Petitioners, we believe that it is not for the NLRB to determine the question whether unions should have a federally protected right to bar foreign shipping from our shores because their crews are paid less than American crews. The existence of a right with such significant consequences to our national economy and to our relations with foreign nations should not be implied in the absence of specific Congressional direction.

Dated: November 26, 1973.

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No. 72-1061

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AMERICAN RADIO ASSOCIATION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

Pursuant to this Court's order of March 26, 1973, inviting the Solicitor General to submit a brief as *amicus curiae* at the petition stage, the United States submitted a memorandum expressing the view of the National Labor Relations Board that the court below had properly decided the case, and urging the Court to deny the petition for a writ of certiorari. The Court granted the petition on June 4, 1973 (412 U.S. 927).

Since the granting of the writ, the Solicitor General has solicited the views of other interested agencies and

departments, including the Department of State. Upon further consideration and upon concluding that it was not the intent of Congress in enacting the National Labor Relations Act to protect activity which could create serious foreign relations problems for the United States, we now urge the Court to reverse the decision below.

The decision in this case could have serious consequences for United States trade, balance of payments, and the economy and give rise to troublesome problems in United States foreign relations. At the present time, foreign-flag shipping is essential to United States trade. More than 90 percent of all United States waterborne foreign trade is carried in foreign-flag ships. In particular, 95 percent of waterborne deliveries of petroleum products are made on the ships of third countries. Existing United States shipping capacity is insufficient to carry any major proportion of our trade. In these circumstances, picketing that prevents the loading or unloading of foreign-flag ships in United States ports could be severely disruptive of United States trade.

The National Labor Relations Board, however, adheres to the views expressed in the memorandum previously submitted. The Department of Labor also shares the views expressed in our earlier memorandum.

STATEMENT

The vessels *Northwind* and *Theomana* are ships of Liberian registry, which carry cargo between United States and foreign ports. The crews and officers of the vessels are foreign nationals (Pet. App. B1–B2). The

wages and other terms and conditions of employment of the crew are covered by contracts with the Pan Hellenic Seamen's Federation, the Indonesia Seafarers, and the Sierra Leone Seamen's Union (Pet. 5).

In October 1971, while both vessels were docked at the Port of Houston, Texas, for the purpose of loading and unloading cargo, six American maritime unions, acting in concert, established picket lines in front of the vessels. There were four pickets at each vessel, carrying signs which read (Pet. App. B2):

ATTENTION TO THE PUBLIC
THE WAGES AND BENEFITS PAID SEAMEN
ABOARD THE VESSEL THEOMANA [NORTHWIND]
ARE SUBSTANDARD TO THOSE OF AMERICAN SEAMEN.
THIS RESULTS IN EXTREME DAMAGE TO OUR WAGE
STANDARDS AND LOSS OF OUR JOBS.
PLEASE DO NOT PATRONIZE THIS VESSEL.
HELP THE AMERICAN SEAMEN.
WE HAVE NO DISPUTE WITH ANY OTHER VESSEL
ON THIS SITE.

[Printed names of the six unions]

The pickets did not speak to anyone. When inquiry was made of them, they handed out literature which read (Pet. App. B2–B3):

TO THE PUBLIC

American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

A strong American Merchant Marine is essential to our national defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.

PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.

Our dispute here is limited to the vessel picketed at this site, the SS [name of vessel added].

There was no labor dispute between the owners of the vessels and their crews or the foreign unions representing them while the picketing took place. None of the crewmen was a member of these unions. The picketing unions did not seek to represent the foreign crewmen. The picketing was peaceful. (Pet. App. B2.) As a result of the picketing, longshoremen and other workmen refused to service the vessels (Pet. App. B3).

The owner of the *Theomana* filed a charge with the Regional Office of the National Labor Relations Board in Houston, alleging that the unions had engaged in secondary picketing in violation of Section 8(b)(4)(B) of the National Labor Relations Act, as amended, 29 U.S.C. 158(b)(4)(B); the charge was subsequently withdrawn (Pet. 10, n. 3). The owners of both

vessels brought the present suit in a Texas state court, seeking an injunction against the picketing on the ground that it was for the purpose of inducing the owners to break their contracts with their crews and the foreign unions representing them and thus was tortious under Texas law (Pet. App. B3–B4). The trial court dismissed the suit on the ground that "the issues raised * * * are arguably within the jurisdiction of the National Labor Relations Board and that for such reason are pre-empted by the Board and this Court is without jurisdiction to proceed further" (Pet. App. A2).

The Court of Civil Appeals for the Fourteenth Judicial District of Texas affirmed. The court found that the unions' picketing was a protest directed to "allegedly substandard wages paid to foreign seamen, with a concurrent request to the public not to patronize the foreign ships" (Pet. App. B12–B13). The court recognized that the Labor Board's jurisdiction did not extend to regulating "the 'internal economy' of the foreign vessel" (Pet. App. B9) under this Court's holdings in *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, and *Incres Steamship Company* v. *Int'l Maritime Workers Union*, 372 U.S. 24. However, the Court found these cases inapposite because the "direct interference is between the consignee and the shipowner, or the shipowner and the stevedore company," rather than "between [the foreign] employer and crewmen" (Pet. App. B13).

The court concluded that the picketing here was, "at least arguably, a protected activity under section 7

of the [NLRA]. As such, it is an activity as to which the exclusive jurisdiction to determine its propriety has been preempted to the NLRB." (Pet. App. B13.)

The Supreme Court of Texas denied the shipowners' application for a writ of error (Pet. App. D1).[1]

DISCUSSION

1. The respondent unions picketed two foreign-flag ships to urge the American public not to patronize the vessels because those crewmen were being paid substandard wages, thereby jeopardizing the work opportunities of American seamen (Pet. App. B12–B13). If the substandard wages protested by the unions had been paid by an American-flag ship to its crewmen, or by a foreign-flag ship to American workers hired to load or unload the ship, such "area standards" picketing would be arguably protected by Section 7 of, and thus preempted by, the National Labor Relations Act. See *Houston Bldg. & Const. Trades Council (Claude Everett Const. Co.)*, 136 NLRB 321; *Int'l Longshoremen's Association, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195.

The basic question is whether the fact that the substandard wages protested were paid by foreign-flag ships to foreign nationals, who were working under contracts negotiated with foreign unions, put the pick-

[1] The Supreme Court of Alabama has recently held that similar picketing by the respondents in Alabama is not preempted by the National Labor Relations Act. *American Radio Ass'n* v. *Mobile Steamship Ass'n*, 83 LRRM 2567 (decided May 3, 1973). But see *contra*, *Mountain Navigation Co.* v. *Seafarer's Int'l Union*, 348 F. Supp. 1298 (W.D. Wis.); *Manners Navigation Co.* v. *Seafarers*, 82 LRRM 2433.

eting here beyond the protections and jurisdictional preemptions of the National Labor Relations Act.

2. "It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country. *Wildenhus's Case,* 120 U.S. 1 (1887)." *Benz* v. *Compania Naviera Hidalgo, supra,* 353 U.S. at 142. But the exercise of that jurisdiction is discretionary. "Often, because of public policy or for other reasons, the local sovereign may exert only limited jurisdiction and sometimes none at all" (*ibid.*). Thus there is no question that Congress has the power to subject this dispute to regulation by the National Labor Relations Board; the only question is whether it has done so.

Congress limited the jurisdiction of the Labor Board to labor disputes "affecting commerce" (29 U.S.C. 160), as that phrase is defined in 29 U.S.C. 152 and construed by this Court. In *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10 and *Incres Steamship Company* v. *Int'l Maritime Workers Union,* 372 U.S. 24, this Court held that "maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2(6), 29 U.S.C. § 152(6) [of the National Labor Relations Act]." *Incres, Supra,* 372 U.S. at 27.

These two cases, and an earlier one, *Benz* v. *Compania Naviera Hidalgo, supra,* illustrate which "maritime operations of foreign-flag ships" are not "commerce" within the meaning of the Act. In *Benz* a foreign-flag vessel temporarily in an American port was picketed by an American seamen's union, supporting the demands of a foreign crew for more favorable con-

ditions than those in the ship's articles which they signed under foreign law, upon joining the vessel in a foreign port. The Court held that the dispute was not preempted by the National Labor Relations Act, stressing the legislative history of the Act and a concern that the Labor Board's jurisdiction not hamper our foreign relations and commerce. The Court said (353 U.S. at 143–144, 146–147):

> Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between *American* employers and employees.
>
> * * * * *
>
> We cannot read into the Labor Management Relations Act an intent to change the contractual provisions made by these parties. For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. [Emphasis added; footnote omitted.]

McCulloch and *Incres* were decided the same day. In *McCulloch* the Court held that the Labor Board was without jurisdiction to order an election upon the petition of an American seamen's union seeking to represent alien crew members of a Honduran-flag vessel, who were already represented by a Honduran

union. In *Incres* the Court held that the Labor Board had no jurisdiction over picketing by an American union formed "for the primary purpose of organizing foreign seamen on foreign-flag ships." 372 U.S. at 25–26. In *McCulloch* the Court noted the same concerns that it had in *Benz:* a lack of a clear directive from Congress and a reluctance to become embroiled in international disputes. The Court again quoted Congressman Hartley's characterization of the Act as "a bill of rights both for *American* workingmen and for their employers" (372 at U.S. 20), and reiterated the conclusion in *Benz* that the legislative history "inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." 372 U.S. at 18. The Court finally expressed fear that an assertion of Labor Board jurisdiction "ultimate[ly] might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturbance not only in the field of maritime law but in our international relations as well." 372 U.S. at 19.

In *Incres, McCulloch* was considered controlling, and the Court stated its conclusion in jurisdictional terms: "maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2(6), 29 U.S.C. § 152(6) [of the National Labor Relations Act]." 372 U.S. at 27.

As developed in these cases, the test of the applicability of the Act to maritime labor disputes is whether the assertion of jurisdiction "would neces-

sitate inquiry into the 'internal discipline and order' of a foreign vessel, an intervention thought likely to 'raise considerable disturbance not only in the field of maritime law but in our international relations as well.' *McCulloch,* 372 U.S., at 19." *Int'l Longshoremen's Association* v. *Ariadne Shipping Co., supra,* 397 U.S. at 198. The question, then, is whether the picketing here so involved the "internal discipline and order" of the foreign-flag vessels as to put the dispute beyond the reach of the Act; and it does not admit of any easy answer. In our earlier memorandum in support of the respondents, we suggested that the picketing did not involve the ships' "internal discipline and order" because "[t]he unions are not seeking to represent or organize the foreign seamen employed on foreign flag ships [*McCulloch* and *Incres*], nor are they seeking to help them in a dispute which they have with their employer [*Benz*]" (United States Memo, p. 8).

In a similar vein the court below stated that "[t]here is no direct interference with the relationship between [foreign] employer[s] and crewmen. Any direct interference is between the consignee and the shipowner, or the shipowner and the stevedore company" (Pet. App. B13). But "direct interference" between the shipowner and third parties is *always* the primary consequence of dockside picketing, so that fact does not distinguish the picketing here from the picketing in *Benz* and *Incres.* Rather reference must be made to the impact of the picketing on the internal economy of the foreign vessel.

Here the picketers carried signs protesting the low wages paid by the foreign vessels to their alien crew:

"THE WAGES AND BENEFITS PAID SEAMEN ABOARD THE VESSEL THEOMANA [NORTHWIND] ARE SUBSTANDARD TO THOSE OF AMERICAN SEAMEN. * * * PLEASE DO NOT PATRONIZE THIS VESSEL" (see, *supra*, p. 3). Taking the unions at their words, the immediate objective of the picketing must have been to force the foreign-flag vessels to pay higher wages and benefits to their alien crewmen than were required by their foreign articles, or negotiated by their foreign unions. This, of course, is precisely the same objective that the unions pursued in *Benz, McCulloch* and *Incres*. That the unions are trying to achieve their objective from the dockside, as it were, rather than by representation of crewmen, hardly lessens their impact on the "internal discipline and order" of the foreign-flag ships.

The respondent unions claim, however, that their real interest is not the plight of the alien crewmen, but the effect of their lower wages on the competitive position of American vessels, upon which their own jobs hinge. They "*were not interested in the internal economy* of the ship[s], but rather were interested in preserving job opportunities for themselves in this country" (Resp. Br., pp. 21–22, quoting *Marine Cooks & Stewards Union* v. *Panama Steamship Co.*, 362 U.S. 365, 371, n. 12.) But, of course, this is precisely the same long-range objective that the unions pursued in *Benz, McCulloch,* and *Incres. See* Pet. Br., pp. 13–14.

Thus the fact that the unions are pursuing a legitimate interest of their own "job opportunities here in the United States" (Resp. Br., p. 23), does not automatically make their conduct "arguably subject" to the National Labor Relations Act, which is the test of

preemption under that Act. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245. The question remains whether their pursuit of that legitimate interest unduly interferes with the "internal discipline and order" of the foreign-flag vessels. As we have indicated (*supra*, p. 11), the picketing here, protesting substandard wages, would seem to affect the internal economy of the vessel as much as an attempt to raise those wages by representation of the seamen.[2]

3. This Court's recent decision in *Int'l Longshoremen's Association* v. *Ariadne Shipping Co., supra*, is not inconsistent with this conclusion. In *Ariadne*, picketing was undertaken to protest the wages paid to American longshoremen who were employed by foreign vessels to handle their cargo. This Court held that the labor dispute was governed by the National Labor Relations Act and therefore preempted from state regulation. The Court reasoned (397 U.S. at 200):

> The American longshoremen's short-term, irregular and casual connection with the respective vessels plainly belied any involvement on

[2] It remains the position of the National Labor Relations Board and the Department of Labor that the impact which the picketing may have had on the internal economy of the foreign-flag vessels was not so great as to take it out of the ambit of the National Labor Relations Act. For, that impact was merely incidental to the unions' primary legitimate objective: protecting the job opportunities of American seamen. It was not, as in *Benz*, *McCulloch* and *Incres*, the result of a direct effort to negotiate for the foreign seamen, or to aid them in a dispute with the foreign shipowners. In the Labor Board's view, it is only such direct involvement in the labor relations of a foreign-flag vessel which renders the National Labor Relations Act inapplicable. Cf. *Marine Cooks & Stewards Union* v. *Panama Steamship Co., supra*.

> their part with the ships' "internal discipline and order." Application of United States law to resolve a dispute over the wages paid the men for their longshore work, accordingly, would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law. We therefore find that these longshore operations were in "commerce" within the meaning of § 2 (6), and thus might have been subject to the regulatory power of the National Labor Relations Board.

In *Ariadne,* an American longshoremen's union picketed to protest substandard wages paid to American workers and residents working exclusively on American docks, casually employed by foreign-flag vessels. There was no attempt to affect the wages paid by the foreign vessels to their own alien crewmen. Accordingly the picketing "threatened no interference in the internal affairs of foreign-flag ships * * *" (397 U.S. at 200). Here, by contrast, it is precisely the wage relationship between the foreign vessels and their alien crewmen which are protested.

4. In *Ariadne,* the Court reiterated and summarized the concern which has underlain each of the decisions in this area: that the Court not construe the NLRA so as possibly to jeopardize the foreign relations of the United States without a clear directive from Congress. The Court said (397 U.S. at 199):

> Thus we could not find [any intention to include within the Act's coverage disputes between foreign ships and their foreign crews] * * *, particularly since to do so would thrust

the National Labor Relations Board into "a delicate field of international relations," *Benz,* 353 U.S., at 147. Assertion of jurisdiction by the Board over labor relations already governed by foreign law might well provoke "vigorous protests from foreign governments and * * * international problems for our Government," *McCulloch,* 372 U.S., at 17, and "invite retaliatory action from other nations," *id.,* at 21. Moreover, to construe the Act to embrace disputes involving the "internal discipline and order" of a foreign ship would be to impute to Congress the highly unlikely intention of departing from "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship," a principle frequently recognized in treaties with other countries. [*Ibid.*]

The picketing here is not an isolated protest; it is part of a comprehensive program of the unions representing "practically almost all American merchant seamen" to "protect and preserve their members' American employment opportunities" (Resp. Br., pp. 2, 4). Assertion of jurisdiction would inevitably "thrust the National Labor Relations Board into 'a delicate field of international relations'" (*Ariadne, supra,* 397 U.S. at 199).

The Department of State is concerned about the impact of an affirmance here upon our relations with other countries. The decision below has already provoked "vigorous protests from foreign governments" (*McCulloch, supra,* 372 U.S. at 17), as evidenced by the *amicus* brief for the Government of Liberia.

Moreover, the Governments of Italy, Norway and the United Kingdom have made representations to the Department of State requesting support for the petitioners here. These protests, while they could not overcome a clear directive from Congress, ought to be given substantial weight by the Court where the respondents are seeking a novel extension of the Act to protect their challenge to foreign-flag shipping. *Benz, supra,* 353 U.S. at 147.

5. Finally to be considered is whether Congress, in the National Labor Relations Act, intended to protect an activity which could have substantial adverse effects on our economy and foreign trade. The campaign undertaken by the respondent unions—if protected—could effectively close our ports to foreign-flag vessels. Close to 95 percent, by tonnage (and 81 percent, by value), of our waterborne foreign trade is carried on foreign-flag vessels (Preliminary Census Figures, 1972). Manifestly any significant interruption of foreign-flag service carrying United States cargo would have substantial economic consequences, not only upon shipowners, but also upon American exporters and importers and their employees, as well as those employed at our ports.

We do not suggest that the respondent unions have any purpose other than a legitimate interest in protecting their own members' job opportunities, and we would not expect that picketing—even if protected—would be used to close American ports entirely to foreign vessels. But, the specific consequences of this situation are difficult to project. Depending

on the unions' decisions, the disruptions in United States trade could be serious with attendant shortages and hardships. Some foreign carriers might not be willing to continue in the United States trade. Other foreign carriers might attempt to avert picketing by raising wages and working conditions; however, this is unlikely because wages and working conditions aboard vessels must respond to international competitive forces. The carriers may instead raise shipping rates to reflect the economic risks of picketing. Any of these results would increase the cost of United States imports, including petroleum. At the same time, the cost of United States exports would be increased to the detriment of sales and the United States balance of payments.

If this picketing is held to be protected by the National Labor Relations Act, the respondent unions will be accorded the *power* substantially to affect our trade with the rest of the world and our international relations. We do not believe that such power should be found in the National Labor Relations Act by implication. If it is to be given to respondent unions, it must be by "the affirmative intention of Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Benz, supra,* 353 U.S. at 147.

CONCLUSION

For these reasons, the judgment of the court below dismissing the complaint should be reversed.

Respectfully submitted.

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ALLAN A. TUTTLE,
Assistant to the Solicitor General.

NOVEMBER 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973

No. 72-1061

Supreme Court of the United States

October Term, 1973

WINDWARD SHIPPING (LONDON) LIMITED, ET AL.,
Petitioners

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONDENTS' REPLY TO THE SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS *Amicus Curiae*

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RESPONDENTS' REPLY TO THE SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS *Amicus Curiae*

This reply to the supplemental memorandum for the United States as *amicus curiae* is filed pursuant to the Chief Justice's leave to respondents to file a response on or before December 14, 1973, granted in open court on December 4, 1973, during the oral argument in the above noted case. The procedural background is as follows:

The petitioners' brief, and the briefs of the amici supporting their position, were filed on or about August 15, 1973. Pursuant to an order of the Court, respondents' brief, and the brief of the amicus supporting their position, were filed on September 28, 1973.

On November 28, 1973, the United States filed its supplemental memorandum supporting the petitioners' position. (That memorandum is "supplemental," since, when this case was pending on a petition for a writ of certiorari, the United States, had, on May 11, 1973, and in response to an order of this Court, filed a memorandum in support of the respondents' position. The supplemental memorandum indicates that the National Labor Relations Board and the Department of Labor continue to take the Government's original position, while the State Department supports the present view. Supp. Mem. pp. 1-2, 12 n.2.)

Despite Rule 42 (2) & (4) of the Rules of this Court which read together appear to require that a brief *amicus curiae* "for the United States sponsored by the Solicitor General" may be filed "only after an order of the Court or when * * * presented within the time allowed for the filing of the brief of the parties supported," the supplemental memorandum was not accompanied by a motion for leave to file out of time or by any statement of reasons as to why that memorandum was tendered 105 days after its due date and 6 days before oral argument. On November 30, 1973 the Clerk advised the undersigned that the appropriate course for respondents if they objected to the filing of the supplemental memorandum was to bring the matter to the Court's attention during oral argument and to request that it be struck or that in the alternative respondents be given an opportunity to respond. This was done and the Court reserved action on the motion to strike, and pending consideration of that request, granted permission to file this reply.

ARGUMENT

1. The supplemental memorandum quotes this Court's statement in *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 18, that the "boundaries" of the National Labor Relations Act include "only the working men of our own country." Supp. Mem. p. 9. It acknowledges that as a general proposition peaceful primary non-recognitional area-standards picketing within the United States by American workers covered by the Act is protected by § 7, citing *Houston Bldg. & Const. Trades Council (Claude Everett Const. Co.)*, 136 NLRB 321; *Int'l. Longshoremen's Association, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195. Supp. Mem. p. 6. Its statement of the case demonstrates that the picketing here was by American seamen acting through their unions and that the picketing met the standards set out in the *Claude Everett* case in every particular. Supp. Mem. pp. 3-6. Moreover, the supplemental memorandum points to nothing in the language or legislative history of the NLRA to support the conclusion that Congress intended § 7 to have a narrower range of application to picketing by American seamen than by other employees governed by federal labor law.

Thus, under established principles, the analytic framework of the supplemental memorandum leads to the conclusion that federal law and not the law of Texas governs here. See *Teamsters Union* v. *Morton*, 377 U.S. 252, 259-260. That, indeed, was the conclusion the Government reached in its original memorandum. Congress has not acted in the interim. Nor has this Court spoken to this subject since then. In order to further foreign relations objectives, the supplemental memorandum, however, now concludes that state

law is controlling. That conclusion will not withstand analysis—as we now demonstrate.

2(a). The supplemental memorandum begins its retreat from the generally applicable principles noted above by summarizing the decisions in *Ariadne*, *McCulloch*, *Incres Steamship Co.* v. *Maritime Workers*, 372 U.S. 24, and *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, and concluding, properly, that "the test of the applicability of the Act to maritime labor disputes is whether the assertion of jurisdiction 'would necessitate inquiry into the 'internal discipline and order' of a foreign vessel.' " Supp. Mem. pp. 7-10.

This summary is incomplete only in its omission of the critical decision of this Court which draws the line between the recognitional activity undertaken in *McCulloch*, *Incres* and *Benz*, which does "necessitate inquiry into the 'internal discipline and order' of a foreign vessel," and is for that reason outside the protective ambit of the NLRA, and non-recognitional area—standards picketing which this Court has characterized as an incident of a "domestic" labor dispute. The decisive point, as Mr. Justice Black stated in *Marine Cooks and Stewards* v. *Panama S.S. Co.*, 362 U.S. 365, 371 n. 12:

> "Unlike the situation in the *Benz* case, in which American unions to which the foreign seamen did not belong picketed the foreign ship in sympathy with the strike of the foreign seamen aboard, the union members here were not interested in the internal economy of the ship, but rather were interested in preserving job opportunities for themselves in this country. They were picketing on their own behalf, not on behalf of the foreign employees as in *Benz*. Though the employer here was foreign, the dispute was domestic."

The line drawn in *Marine Cooks* is, of course, precisely parallel to that recognized in *Claude Everett* as marking the outer boundary of protected activity in labor disputes such as these. This serves to preserve parity under the law between American seamen and the other classes of workers covered by the Act, and between foreign flag vessels and other employees. See the Brief for the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in this case at pp. 3-15.

(b) The Supplemental Memorandum seeks to obliterate this line by arguing that:

> "Taking the unions at their words, the immediate objective of the picketing must have been to force the foreign-flag vessels to pay higher wages and benefits to their alien crewmen than were required by their foreign articles, or negotiated by their foreign unions." Supp. Mem. p. 11.

This misstates the record. That objective as stated on the handbills distributed by the pickets was to have those who saw their message "Patronize American Flag Vessels, Save Our Jobs, Help Our Economy And Support Our National Defense By Helping To Create A Strong American Merchant Marine." Supp. Mem. p. 4. The supplemental memorandum cites no evidence for its characterization of the union's immediate objective and there is none. The Government therefore falls back to the argument that in *Benz, McCulloch* and *Incres,* no less than in *Marine Cooks* and the instant case, the "long-range objective" of the picketing was to preserve American job opportunities. Supp. Mem. p. 11. But the lesson of *Marine Cooks* is that where the picketing's immediate objective, as well as its long-range

objective, is limited to the preservation of the job opportunities of American seamen and does not cross over to "seeking to represent or organize the foreign seamen employed on foreign flag ships [*McCulloch* and *Incres*], nor * * * seeking to help them in a dispute which they have with their employer [*Benz*]," it is protected by federal law 'because it does "not involve the ships' 'internal discipline and order'." Cf. Supp. Mem. p. 10.

3. In apparent recognition that its gambit in attempting to redefine the nature of the objective of this picketing is doomed to failure, the supplemental memorandum then attempts to sweep all the chessmen from the table:

> "In *Ariadne*, the Court reiterated and summarized the concern which has underlain each of the decisions in this area: that the Court not construe the NLRA so as possibly to jeopardize the foreign relations of the United States without a clear directive from Congress." Supp. Mem. p. 13

The succeeding quotation makes it plain that *Ariadne* announces no such principle. That decision emphasizes that *Benz, McCulloch* and *Incres* precluded "Assertion of jurisdiction by the Board over labor relations already governed by foreign law." 397 U.S. at 199. But foreign law does not govern this dispute. Indeed, the limitless principle announced by the Government is without support in reason as well as precedent. Every longshoreman's strike, to use only the most obvious example, can be said to "possibly * * * jeopardize the foreign relations of the United States." For such strikes have a far more pervasive effect on the movement of maritime commerce between nations than the picketing here. This is equally true of strikes at American

airports, at American manufacturers who export, at American retailers who import. Congress has recognized all this and has nevertheless opted for a labor policy which includes the right to strike and picket "at its core." *Bus Employees v. Missouri*, 374 U.S. 74, 81. As the Board stated in an early leading case, "Although the Board does not have jurisdiction over foreign manufacturers as such, it does have jurisdiction over unfair labor practices occurring in this country and affecting foreign commerce." *Washington-Oregon Shingle Weavers Council*, 101 NLRB 1159, 1161. And as this Court's decision in *Ariadne* demonstrates, it is equally well settled that the Act also governs "protected activity" affecting foreign commerce. See also e.g. *Moore Dry Dock Co.*, 92 NLRB 547.

Continuing in the same vein, the supplemental memorandum states:

> "Finally to be considered is whether Congress, in the National Labor Relations Act, intended to protect an activity which could have substantial adverse effects on our economy and foreign trade." Supp. Mem. p. 15.

That question has long ago been answered in the affirmative. Congress has understood the magnitude of the power to strike. It has restricted that power as it has seen fit but it has been circumspect in doing so. And this Court has recognized in numerous instances that this circumspection is not a ground for the application of state law. As Chief Justice Vinson stated in overturning the Wisconsin Public Utility Anti-Strike Law:

> "We have recently examined the extent to which Congress has regulated peaceful strikes for higher

wages in industries affecting commerce. International Union of United Auto Workers v. O'Brien, 339 US 454, (1950). We noted that Congress, in § 7 of the National Labor Relations Act of [July 5] 1935, as amended by the Labor Management Relations Act of [June 23] 1947, expressly safeguarded for employees in such industries the 'right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection, 'e.g., to strike.' We also listed the qualifications and regulations which Congress itself has imposed upon its guarantee of the right to strike, including requirements that notice be given prior to any strike upon termination of a contract, prohibitions on strikes for certain objectives declared unlawful by Congress, and special procedures for certain strikes which might create national emergencies. Upon review of these federal legislative provisions, we held, 339 US at 457:

'None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation.' " *Amalgamated Association of Streetcar Employees* v. *Wisconsin Employment Relations Board,* 340 U.S. 383, 389-390; footnotes omitted.

CONCLUSION

For the reasons stated above as well as those stated in the respondents' main brief, the judgment of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas should be affirmed.

Respectfully submitted,

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December, 1973

WINDWARD SHIPPING (LONDON) LTD. ET AL. v. AMERICAN RADIO ASSOCIATION, AFL-CIO, ET AL.

CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS, FOURTEENTH SUPREME JUDICIAL DISTRICT

No. 72-1061. Argued December 3-4, 1973—
Decided February 19, 1974

Petitioners, foreign-flag shipowners and agents, sought injunctive relief in the Texas state courts to bar, as tortious under Texas law, the picketing of their vessels by respondent unions, which were protesting as substandard the wages paid to the foreign crewmen, who manned the vessels. The trial court sustained respondents' contention that state-court jurisdiction was pre-empted by the Labor Management Relations Act (LMRA), and the appellate court affirmed. *Held:* Respondents' activities, which did not involve wages paid within this country but were designed to force the foreign vessels to raise their operating costs to levels comparable to those of American shippers, would have materially affected the foreign ships' "maritime operations" and precipitated responses by the foreign shipowners in the field of international relations transcending the domestic wage-cost decision that the LMRA was designed to regulate. Respondents' picketing was consequently not activity "affecting commerce" as defined in §§ 2 (6) and (7) of the National Labor Relations Act, as amended by the LMRA, and the Texas courts erred in holding that they were prevented by the LMRA from entertaining petitioners' injunction suit. *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138, followed; *Longshoremen* v. *Ariadne Co.*, 397 U. S. 195, distinguished. Pp. 109-116.

482 S. W. 2d 675, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, STEWART, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 116.

Robert S. Ogden, Jr., argued the cause for petitioners. With him on the briefs were *James V. Hayes* and *Joseph E. Fortenberry*.

Howard Schulman argued the cause for respondents. With him on the brief was *W. Arthur Combs*.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners are the owners and managing agents of two ships which are registered under the laws of Liberia and fly the Liberian flag. They sought injunctive relief in the state courts in Texas to bar picketing of their vessels by respondent unions. The trial court denied relief, finding that the dispute was "arguably" within the jurisdiction of the National Labor Relations Board and that the jurisdiction of the state courts was therefore pre-empted. The Texas Court of Civil Appeals affirmed,[1] and we granted certiorari, 412 U. S. 927 (1973), to consider whether the activities here complained of were activities "affecting commerce" within the meaning of §§ 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 450, 29 U. S. C. §§ 152 (6) and (7).[2] We hold that they were

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Bork* and *Allan A. Tuttle* for the United States; by *Frank L. Wiswall, Jr.*, for the Republic of Liberia; by *Bryan F. Williams, Jr.*, for the West Gulf Maritime Assn., Inc.; and by *Frank McRight* for the Mobile Steamship Assn.

J. Albert Woll, Laurence Gold, and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

[1] 482 S. W. 2d 675 (1972).

[2] The definitions in §§ 2 (6) and (7), 29 U. S. C. §§ 152 (6) and (7), as amended by the Labor Management Relations Act, 1947, are as follows:

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United

not, and therefore reverse the judgment of the Court of Civil Appeals.

I

The vessels *Northwind* and *Theomana* are ships of Liberian registry, carrying cargo between foreign ports and the United States. *Northwind* is owned by petitioner Westwind Africa Line, Ltd., a Liberian corporation, while *Theomana* is owned by petitioner SPS Bulkcarriers Corp., a Liberian corporation, and managed by petitioner Windward Shipping (London) Ltd., a British corporation. The crews of both vessels are composed entirely of foreign nationals, represented by foreign unions and employed under foreign articles of agreement.

Respondents are American maritime unions, apparently representing a substantial majority of American merchant seamen.[3] Alarmed by an accelerating decline in the number of jobs available to their members, these unions agreed to undertake collective action against foreign vessels, which they saw as the major cause of their business recession. Specifically, these unions agreed to picket foreign ships, calling attention to the competitive advantage enjoyed by such vessels because of a difference

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States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

[3] Respondents describe themselves in their brief as "six labor organizations who collectively represent the overwhelming majority and practically almost all American merchant seamen." (Brief for Respondents 2.)

between foreign and domestic seamen's wages. All parties concede that such a difference does exist.[4]

The picketing here occurred at the Port of Houston, Texas, in October 1971. Both *Northwind* and *Theomana* were docked within the port, and respondents established picket lines in front of each vessel. There were four pickets assigned to each vessel, carrying signs which read:

"ATTENTION TO THE PUBLIC
THE WAGES AND BENEFITS PAID SEAMEN ABOARD THE VESSEL THEOMANA [NORTHWIND] ARE SUBSTANDARD TO THOSE OF AMERICAN SEAMEN. THIS RESULTS IN EXTREME DAMAGE TO OUR WAGE STANDARDS AND LOSS OF OUR JOBS. PLEASE DO NOT PATRONIZE THIS VESSEL. HELP THE AMERICAN SEAMEN. WE HAVE NO DISPUTE WITH ANY OTHER VESSEL ON THIS SITE."
[Printed names of the six unions.]

These signs were supplemented by pamphlets of similar import.[5] The pickets were instructed not to

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[4] The petitioners state:

"We do not contest the fact that the wages of foreign crews on foreign ships are substantially lower than those paid to American seamen on American ships." Brief for Petitioners 19.

The brief notes some estimates that the American wage costs are between 2½ to 4 times higher than the foreign wage costs. *Id.*, at 19 n.

[5] These leaflets stated:

"To the Public—American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

"American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

"A strong American Merchant Marine is essential to our national

discuss the picketing with anyone, and they appear to have followed their instructions.

The picketing, although neither obstructive nor violent, was not without effect. Longshoremen and other port workers refused to cross the picket lines to load and unload petitioners' vessels. Petitioners filed separate suits in a Texas state court, asking the court to enjoin the picketing as tortious under Texas law. The primary basis for petitioners' claim was that the picketing sought to induce the owners and crews to break pre-existing contracts. Respondents presented several defenses, contending in particular that the jurisdiction of the Texas court was pre-empted by the National Labor Relations Act.[6]

The trial court sustained this contention, holding that jurisdiction properly lay with the NLRB, and the Texas Court of Civil Appeals affirmed. That court found that state jurisdiction was pre-empted by the Act when "the activities complained of are arguably either protected by section 7 or prohibited by section 8 of the NLRA as amended by the LMRA,"[7] see *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), and that the conduct here met that test. The court rejected petitioners' argument that the picketing interfered with the "maritime operations of foreign-flag

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defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.

"PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.

"Our dispute is limited to the vessel picketed at this site, the S. S. ———" (App. 21).

[6] The courts below considered only this ground advanced by respondents, finding it dispositive. We express no opinion on the merits of respondents' other contentions.

[7] 482 S. W. 2d, at 678.

ships," see *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10 (1963), in such manner as to remove it from the Board's jurisdiction.[8] The court concluded:

> "If [the picketing] but voices a complaint as to foreign wages and urges the public not to patronize foreign vessels it does not engage in matters outside of commerce. It is peaceful picketing, publicizing a labor dispute, of such a character that its validity is suggested by the Court's holding in the Marine Cooks case, supra. It is, at least arguably, a protected activity under section 7 of the LMRA. As such, it is an activity as to which the exclusive jurisdiction to determine its propriety has been preempted to the NLRB."[9]

Petitioners contend that the Court of Appeals too narrowly construed this Court's decisions denying the NLRB jurisdiction in cases involving foreign-flag ships. We therefore begin by examining the principles established by those decisions for determining the jurisdiction of the NLRB.

II

In a series of cases decided over the past 17 years,[10] this Court has discussed the application of the Labor Management Relations Act in situations which might be broadly described as disputes between unions representing workers in this country and owners of foreign-flag vessels operating in international maritime commerce. *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138 (1957), is the leading case on the subject. In *Benz*

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[8] *Id.*, at 680–682.

[9] *Id.*, at 682.

[10] *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138 (1957); *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10 (1963); *Incres S. S. Co.* v. *Maritime Workers*, 372 U. S. 24 (1963); *Longshoremen* v. *Ariadne Co.*, 397 U. S. 195 (1970).

the question was whether the Labor Management Relations Act, 1947, precluded a diversity suit for damages brought in the United States District Court by foreign shipowners against picketing American unions. The picketing had been undertaken in Portland, Oregon, to support striking foreign crews employed under foreign articles and had resulted in the refusal of workers to load and repair the docked foreign ships. The District Court had awarded damages and the Court of Appeals affirmed.

This Court held that the shipowners' action was not pre-empted by the Labor Management Relations Act. Studying the legislative history of the Act, the Court found no indication that it was intended to govern disputes between foreign shipowners and foreign crews. On the contrary, the Court concluded that the most revealing legislative history strongly suggested the bill was a "bill of rights . . . for *American* workingmen and for their employers." 353 U. S., at 144. (Emphasis in original.) The Court stated that this history "inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." *Ibid.*

Recognition of the clear congressional purpose to apply the LMRA only to American workers and employers was doubtless a sufficient reason to place the picketing in *Benz* outside the Act. But the Court in that case made clear its reluctance to intrude domestic labor law willy-nilly into the complex of considerations affecting foreign trade, absent a clear congressional mandate to do so:

> "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the

possibilities of international discord are so evident and retaliative action so certain." *Id.*, at 147.

In the 17 years since *Benz* was decided, Congress has in no way indicated any such "affirmative intention," and this Court has continued to construe the LMRA in accordance with the dictates of that case.

The reasoning of *Benz* was reaffirmed in *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10 (1963), and *Incres S. S. Co.* v. *Maritime Workers*, 372 U. S. 24 (1963), decided together six years later. In *McCulloch*, we held that the National Labor Relations Board had improperly assumed jurisdiction under the Act to order an election involving foreign crews of foreign-flag ships. Rejecting the Board's "balancing of contacts" theory, the Court said:

> "[T]o follow such a suggested procedure to the ultimate might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports." 372 U. S., at 19.[11]

In *Incres* we applied this rationale to a situation involving union picketing of a foreign ship in an effort to organize the foreign crew. Reversing the holding of a New York state court that the picketing was arguably within the jurisdiction of the NLRB, the Court said:

> "The Board's jurisdiction to prevent unfair labor practices, like its jurisdiction to direct elections, is based upon circumstances 'affecting commerce,' and we have concluded that maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2 (6), 29 U. S. C. § 152 (6)." 372 U. S., at 27.

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[11] The Court in *McCulloch* also noted that the Board's actions had "aroused vigorous protests from foreign governments and created international problems for our Government." 372 U. S., at 17.

But *Benz* and its successor cases have not been read to exempt all organizational activities from the Act's protections merely because those activities in some way were directed at an employer who was the owner of a foreign-flag vessel docked in an American port. In *Longshoremen* v. *Ariadne Co.*, 397 U. S. 195 (1970), the Court held that the picketing of foreign ships to protest substandard wages paid by their owners to nonunion American longshoremen was "in 'commerce' within the meaning of § 2 (6), and thus might have been subject to the regulatory power of the National Labor Relations Board." *Id.*, at 200. The pickets in *Ariadne*, unlike the pickets in *Benz* or *Incres*, were primarily engaged in a dispute as to whether an employer should hire unionized or nonunionized American workers to perform longshoremen's work,[12] and the substandard wages which they were protesting were being paid to fellow American workers. The Court specifically noted: "[T]his dispute centered on the wages to be paid American residents." *Id.*, at 199.

The term "in commerce," as used in the LMRA, is obviously not self-defining, and certainly the activities in *Benz*, *McCulloch*, and *Incres*, held not covered by the Act, were literally just as much "in commerce" as were the activities held covered in *Ariadne*. Those cases which deny jurisdiction to the NLRB recognize that Congress, when it used the words "in commerce" in the LMRA, simply did not intend that Act to erase long-

[12] The evidence in *Ariadne* showed that the work at issue was performed partly by members of the foreign ships' crews and partly by outside labor. 397 U. S., at 196. Those workers included in the classification "outside labor" were nonunion members. This Court noted that "[t]he participation of some crew members in the longshore work does not obscure the fact that this dispute centered on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but rather to do casual longshore work." *Id.*, at 199.

standing principles of comity and accommodation in international maritime trade. In *Lauritzen* v. *Larsen*, 345 U. S. 571, 577 (1953), the Court commented on the congressional intent with respect to the Jones Act of 1920 in these words:

> "But Congress in 1920 wrote these all-comprehending words, not on a clean slate, but as a postscript to a long series of enactments governing shipping. All were enacted with regard to a seasoned body of maritime law developed by the experience of American courts long accustomed to dealing with admiralty problems in reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations." [13]

We are even more reluctant to attribute to Congress an intention to disrupt this comprehensive body of law by construction of an Act unrelated to maritime commerce and directed solely at American labor relations.

III

The picketing activities in this case do not involve the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres;* respondents seek

[13] The basic question at issue in *Lauritzen* was whether American or Danish law applied to a maritime tort which occurred in Havana Harbor. Although analysis of the Jones Act there obviously involved different considerations from analysis of the Labor Management Relations Act here, it is interesting to note that some arguments at least are common to both cases. In *Lauritzen* this Court rejected a "candid and brash appeal" made by the seamen and various *amici* that the Court should "extend the law to this situation as a means of benefiting seamen and enhancing the costs of foreign ship operation for the competitive advantage of our own." 345 U. S., at 593. We observed at that time that such arguments were obviously better directed to Congress.

neither to organize the foreign crews for purpose of representation nor to support foreign crews in their own wage dispute with a foreign shipowner. But those cases do not purport to fully delineate the threshold of interference with the maritime operations of foreign vessels which makes the LMRA inapplicable.

The picket signs utilized at the docks where the *Northwind* and *Theomana* were tied up protested the wages paid to foreign seamen who were employed by foreign shipowners under contracts made outside the United States. At the very least, the pickets must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to those of American shippers, either because of lost cargo resulting from the longshoremen's refusal to load or unload the vessels, or because of wage increases awarded as a virtual self-imposed tariff to regain entry to American ports. Such a large-scale increase in operating costs would have more than a negligible impact on the "maritime operations" of these foreign ships, and the effect would be by no means limited to costs incurred while in American ports. Unlike *Ariadne*, the protest here could not be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country.

In this situation, the foreign vessels' lot is not a happy one. A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the most significant and far-reaching effect on the maritime operations of these ships throughout the world. A decision to boycott American ports in order to avoid the difficulties induced by the picketing would be detrimental not only to the private balance sheets of the foreign shipowners but to the citizenry of a country as dependent on goods carried in foreign bottoms as is ours. Retaliatory action against American vessels in

foreign ports might likewise be considered, but the employment of such tactics would probably exacerbate and broaden the present dispute. Virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate. This case, therefore, falls under *Benz* rather than under *Ariadne*.[34]

Since we hold that respondents' picketing was not "in commerce" as defined by the Act, we do not reach the question of whether the activity was otherwise of such a nature that state courts would be precluded by the LMRA from entertaining an action to enjoin it. Our conclusion that the activities here involved were not "in commerce" within the meaning of §§ 2 (6) and (7) of the NLRA, as amended by the LMRA, resolves a question which, of course, is one for the courts in the first instance. *Ariadne*, 397 U. S., at 200. The Court of Civil Appeals was therefore wrong in holding that the courts of the State of Texas were prevented by the Labor Management

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[34] We do not find the rationale of *Marine Cooks & Stewards* v. *Panama S. S. Co.*, 362 U. S. 365 (1960), to be applicable here. Although that case involved a labor situation strikingly similar to the situation involved in this case, the controlling question in *Marine Cooks* was the jurisdiction of a federal district court to enjoin picketing of a foreign-flag ship under the Norris-LaGuardia Act, 29 U. S. C. § 101 *et seq.* The Court held that in such circumstances the district courts had no jurisdiction. However, as we later noted in *McCulloch*, 372 U. S., at 18, *Marine Cooks* "cannot be regarded as limiting the earlier *Benz* holding . . . since no question as to 'whether the picketing . . . was tortious under state or federal law' was either presented or decided." Obviously the question whether Congress intended the federal courts to stay out of the labor injunction business involves significantly different considerations from the question whether Congress intended the Labor Management Relations Act to apply to the type of picketing of foreign ships involved here.

Relations Act from entertaining petitioners' suit for an injunction.

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

Today's reversal of the Texas Court of Civil Appeals does not, of course, end this case. There remain for disposition on remand two of the respondents' defenses not reached by the Texas courts, namely (1) that Texas law does not proscribe respondents' picketing, and (2) that, in any event, the First and Fourteenth Amendments protect respondents' conduct.[1]

But the fact that today's decision does not finally decide the legality of respondents' picketing should not obscure the significance of the Court's holding. Ninety-five percent of our export trade has already fled American-flag vessels for cheaper, foreign-registered shipping.[2] In holding that respondents' picketing against foreign-flag vessels does not give rise to a dispute "affecting commerce" within the National Labor Relations Board's jurisdiction, the Court effectively deprives American seamen, among all American employees in commerce, of any federally protected weapon with which to try to save their jobs.[3] Additionally, the Court creates new difficul-

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[1] See *NLRB* v. *Fruit & Vegetable Packers*, 377 U. S. 58 (1964); *id.*, at 76 (Black, J., concurring); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940).

[2] See S. Rep. No. 91-1080, p. 16 (1970). See also *id.*, at 17 (Chart 7: Projected Decline in Seafaring Job Opportunities in Foreign Trade Fleet from 1969 to 1980).

[3] Those meager materials to be found in the congressional debates concerning the Labor Management Relations Act contradict the notion that Congress meant to distinguish among American workingmen for purposes of defining the Board's jurisdiction over labor disputes affecting commerce. See H. R. Rep. No. 245, 80th Cong.,

ties for the Board in its administration of the Act by making the Board's statutory jurisdiction turn on the identity of the competitor that might be affected by the picketing—a distinction relevant in the determination whether picketing is protected or prohibited activity under the Act, but a distinction rejected in other contexts in the determination of Board jurisdiction.[4]

There is, of course, no doubt that Congress possesses the power to subject foreign shipping in American terri-

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1st Sess., 4 (1947), discussed in *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138, 142–144 (1957). See also *Longshoremen* v. *Ariadne Co.*, 397 U. S. 195, 198–199 (1970).

[4] Thus, the Court refused to make that distinction even where the language of the Act might have been read as indicating that Congress meant to draw it. In *Teamsters* v. *New York, N. H. & H. R. Co.*, 350 U. S. 155 (1956), a union engaged in the over-the-road trucking of freight picketed a railroad loading yard to protest the "piggy-backing" of truck trailers on railroad cars that was curtailing their opportunities for employment. The railroad, subject to the Railway Labor Act, 45 U. S. C. § 151, was a "person" exempted from the NLRA's definition of "employer." 29 U. S. C. § 152 (2).

Nonetheless, the Court relied upon the finding of the lower court that the "union was in no way concerned with [the railroad's] labor policy," and held that the dispute was subject to the jurisdiction of the National Labor Relations Board. The Court said:

"This interpretation permits the harmonious effectuation of three distinct congressional objectives: (1) to provide orderly and peaceful procedures for protecting the rights of employers, employees and the public in labor disputes so as to promote the full, free flow of commerce, as expressed in § 1 (b) of the Labor Management Relations Act; (2) to maintain the traditional separate treatment of employer-employee relationships of railroads subject to the Railway Labor Act; and (3) to minimize 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.' *Garner* v. *Teamsters Union*, 346 U. S. 485, 490." 350 U. S., at 160–161.

In contrast, there is no wording in the statute, or any legislative history, supporting a reading that Congress meant to draw that line as to seamen.

torial waters to the federal labor laws.[5] And the Court concedes that the picketing activities involved here fall literally within the term "commerce" as used in the Labor Management Relations Act. *Ante*, at 112.

After acknowledging the paucity of support for an exclusion in the term "commerce," the Court, however, concludes that prior cases construing the "affecting commerce" limitation in §§ 2 (6), 2 (7), and 10 (29 U. S. C. §§ 152 (6), 152 (7), and 160) support the holding that respondents' picketing against foreign-flag vessels is conduct not cognizable by the Board. With respect, I think that the Court misreads those cases, and also fails to take account of other relevant congressional and judicial guidance that leads to a contrary conclusion.

As the Court concedes, none of the cases relied upon reached the question before us, that is, whether American seamen may employ economic weapons to try to save their jobs by improving the competitive positions of their domestic employers *vis-à-vis* foreign shipping. Yet the Court relies upon those decisions as supporting the proposition that we must conclude that Congress "simply did not intend that Act [LMRA] to erase longstanding principles of comity and accommodation in international maritime trade," *ante*, at 112–113, because the *economic impact* upon foreign shipping from respondents' picketing might severely disrupt the maritime operations of foreign vessels. Not a word or sentence in any opinion in those cases supports that reading. Rather, those decisions

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[5] See *Benz* v. *Compania Naviera Hidalgo*, *supra*, at 142:

"It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country. *Wildenhus's Case*, 120 U. S. 1 (1887). . . . It follows that if Congress had so chosen, it could have made the Act applicable to wage disputes arising on foreign vessels between nationals of other countries when the vessel comes within our territorial waters."

rested squarely upon the reasoning that, in circumstances where Board cognizance of a dispute will necessarily involve Board inquiry into the *labor relations* between foreign crews and foreign vessels, Congress could not be understood to have granted the Board jurisdiction of the dispute.

In *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138 (1957), the seminal case in this area, an American union attempted to organize the foreign crew of a vessel operating under a foreign flag. The Court, holding that Congress did not fashion the LMRA "to resolve labor disputes between nationals of other countries operating ships under foreign laws," *id.*, at 143, said:

> "It should be noted at the outset that the dispute from which these actions sprang arose on a foreign vessel. It was between a foreign employer and a foreign crew operating under an agreement made abroad under the laws of another nation. The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing." *Id.*, at 142.

Similarly, subsequent decisions also turned jurisdiction on the determination whether Board cognizance would require the Board to inquire into the internal relations between the foreign ship's crew and its foreign owner. In *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10 (1963), we held that the Board did not have jurisdiction to order an election on a foreign-flag vessel, for

> "to follow such a suggested procedure to the ultimate might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports." *Id.*, at 19.

In *Incres S. S. Co.* v. *Maritime Workers*, 372 U. S. 24 (1963), the issue was whether the Board had power to

adjudicate the legality of the efforts of a union to organize the members of a foreign crew. Again, the Court held that the Board was without jurisdiction under the Act, since adjudication of that question would require that the Board examine into the relations between that crew and its foreign-flag employer. *Id.*, at 27–28.

The question whether a labor dispute would necessitate Board inquiry into the relations between foreign vessels and crews was yet again central in *Longshoremen* v. *Ariadne Co.*, 397 U. S. 195 (1970), the most recent of the cases, where we sustained Board jurisdiction of a dispute involving picketing of a foreign-flag ship in protest against wages being paid to American longshoremen unloading the foreign vessel in an American port. We held that the prohibited inquiry would not result in that case, explaining:

> "We hold that [the longshoremen's] activities were not ['maritime operations of foreign-flag ships']. The American longshoremen's short-term, irregular and casual connection with the respective vessels plainly belied any involvement on their part with the ships' 'internal discipline and order.' Application of United States law to resolve a dispute over the wages paid the men for their longshore work, accordingly, would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law. We therefore find that these longshore operations were in 'commerce' within the meaning of § 2 (6), and thus might have been subject to the regulatory power of the National Labor Relations Board." *Id.*, at 200.

Thus, the only appropriate issue in the instant case is whether NLRB cognizance of respondents' picketing

would require that the Board inquire into the "internal discipline and order" of foreign vessels, and thus threaten "interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law." Tested by that principle, I conclude, contrary to the Court, that this case falls under *Ariadne* rather than under *Benz*.

Ariadne is the controlling precedent even if the Court is correct that this dispute "could not be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country." *Ante*, at 114. For respondents' picketing is not directed at forcing the shipowner to make that or any other accommodation that could be characterized as interference with relations between crew and shipowners. Respondents' target is to persuade shippers not to patronize foreign vessels, and respondents have no concern with the form of the shipowner's response that makes their efforts succeed.*

Similarly, *Ariadne* is the controlling precedent even if the Court is right that "[v]irtually none of the predict-

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* The picket signs were not directed to improvement of the foreign crew's wages and working conditions. The protest was carefully phrased to appeal to shippers not to patronize the foreign ships because payment of wages "substandard to those of American seamen . . . results in extreme damage to our wage standards and loss of our jobs." Thus, cognizance of the dispute to determine the legality of the picketing as an unfair labor practice need not involve the Board in an inquiry whether the picketing called for an employer response in the form of an increase in the crew's wages. This would not of course mean that respondents would prevail on the merits. There may well be a question, for example, whether the picketing falls within the ban of § 8 (b)(7) as prohibited recognitional picketing. See Rosen, Area Standards Picketing, 23 Lab. L. J. 67 (1972); Note, Picketing for Area Standards: An Exception to Section 8 (b)(7), 1968 Duke L. J. 767.

able responses of a foreign shipowner to picketing of this type . . . would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA [as it amended the NLRA] was designed to regulate." *Ante*, at 115. The question whether this case falls within the Board's jurisdiction does not turn on the "predictable responses" of the foreign shipowner but, under our cases from *Benz* to *Ariadne*, solely on the question whether cognizance of respondents' activity would involve the Board in an examination into the internal relations between the foreign crews and shipowners. Cognizance of respondents' conduct in this case would not appear to require that inquiry. In any event, as the Texas Court of Civil Appeals correctly observed, it suffices for Board jurisdiction of that conduct that it is arguable whether that inquiry is required, for in such case it is for the Board to determine in the first instance whether that conduct involves a labor dispute within its cognizance. *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959).

But my disagreement with the Court does not rest alone on its failure adequately to rationalize and distinguish the case law. As the Court states, the Nation's labor laws must be read in light of the longstanding involvement of Congress with maritime affairs. If that involvement is examined, however, it will demonstrate that, beginning with its first session, 1 Stat. 55, Congress has been deeply engaged in legislating to protect American vessels from competition, usually by enacting discriminatory laws against foreign-flag vessels. Myriad hearings and reports reflect congressional determination that the American merchant marine, largely because of protections afforded American seamen's wages and working conditions in collective bargaining fostered by the National Labor Relations Act, shall have legislative help

to support its efforts to compete on equal terms for a share of our foreign commerce.[7]

This congressional support was highlighted as recently as 1970, in amendments to the Merchant Marine Act, 1936, 46 U. S. C. § 1101 *et seq.*, to which we may look with profit. The declaration of policy of that Act, as amended in 1970, states as its purpose that "[i]t is necessary for the national defense and development of [the United States'] foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States . . . ." That merchant marine is further to be "owned and operated under the United States flag by citizens of the United States, insofar as may be practicable," and is to be "manned with a trained and efficient citizen personnel." 46 U. S. C. § 1101. See also Merchant Marine Act, 1920, 46 U. S. C. § 861. The 1936 Act furthers those aims by providing subsidies for the construction and operation of American-flag shipping, 46 U. S. C. §§ 1151, 1171, and goes far in imposing discriminations against foreign-flag shipping in regard to certain types of freight. 46 U. S. C.

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[7] See, *e. g.*, H. R. Rep. No. 91-1073 (1970); S. Rep. No. 91-1080 (1970); Hearings on H. R. 12324 and H. R. 12569 before the Subcommittee on Merchant Marine of the House Committee on Merchant Marine & Fisheries, 92d Cong., 2d Sess. (1972) (Cargo for American Ships); Hearings on H. R. 15424, H. R. 15425, and H. R. 15640 before the Subcommittee on Merchant Marine of the House Committee on Merchant Marine & Fisheries, 91st Cong., 2d Sess. (1970) (President's Maritime Program, pt. 2); Hearings on S. 3287 before the Merchant Marine Subcommittee of the Senate Committee on Commerce, 91st Cong., 2d Sess. (1970) (The Maritime Program); Hearings on H. R. 1897, H. R. 2004, and H. R. 2331 before the House Committee on Merchant Marine & Fisheries, 88th Cong., 1st Sess. (1963) (Maritime Labor Legislation).

§ 1241. See also 46 U. S. C. §§ 251, 808 (restricting coastwise trade). Far from conduct in conflict with Congress' legislative policies in the maritime field, respondents' picketing seeks precisely the same goals.

Yet the Court, although not remotely suggesting that respondents' picketing constitutes an illegal intrusion by private citizens into foreign affairs, reaches a conclusion that necessarily implies that Congress was content to leave the whole problem to resolution by the States. It is inconceivable that Congress meant to leave regulation of activity in this area of predominantly national concern to disparate state laws reflecting parochial interests.

I would affirm the judgment of the Texas Court of Civil Appeals.